SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 693.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF W. T. MOSIER AND LOUISA MOSIER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3422.

JOHN BARTON PAYNE, Secretary of the Interior, Appellant,
vs.
THE UNITED STATES OF AMERICA on the Relation of W. T. MOSER and LOUISA MOSER.

a Supreme Court of the District of Columbia.

At Law. No. 62494.

THE UNITED STATES OF AMERICA on the Relation of W. T. MOSIER and LOUISA MOSIER, Plaintiffs,
vs.
FRANKLIN K. LANE, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:—

1 *Petition for Writ of Mandamus.*

Filed May 31, 1919.

In the Supreme Court of the District of Columbia.

At Law. No. 62494.

THE UNITED STATES OF AMERICA on the Relation of W. T. MOSIER and LOUISA MOSIER, Plaintiff,
vs.
FRANKLIN K. LANE, Secretary of the Interior, Defendant.

To the Supreme Court of the District of Columbia:

Your petitioner would respectfully show:
1st. That W. T. Mosier and Louisa Mosier are members of the Osage Tribe of Indians in Oklahoma, and are duly and regularly

enrolled as members of said Tribe under and by virtue of the Act of Congress of June 28th, 1906 (34 Stat. L., 539), and are now maintaining tribal relations with said Tribe, their enrollment numbers with said Tribe being respectively, No. 1566 and No. 1567.

That John T. Mosier, Edwin P. Mosier, Luther C. Mosier and Agnes C. Mosier are also members of the Osage Tribe of Indians, and their enrollment numbers with said Tribe are No. 1569, No. 1570, No. 1571 and No. 1572, respectively.

That W. T. Mosier and Louisa Mosier, for whom this action is brought, are the parents of said John T. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, who are minors, and as such parents, they have the care, custody, control and keeping of said minors, and the same are now in their custody and control.

2nd. That Franklin K. Lane, the defendant, is the duly appointed, qualified and acting Secretary of the Interior of the United
2 States of America, and is sued as such Secretary of the Interior.

3rd. That John T. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, the minors above referred to, under and by virtue of the Act of Congress of June 28th, 1906 (34 Stat. L., 539-545), have been allotted each his respective part of the lands belonging to the Osage Tribe of Indians in Oklahoma, and said lands are now in the custody and control of W. T. Mosier and Louisa Mosier, for whom this action is brought. That, in addition to being allotted each his respective share of said lands, there was allotted to each one of said minors his respective share of the fund known as the "trust fund," which was held by the Government of the United States in trust for the Osage Tribe of Indians, and which was distributed and allotted among the members of the Osage Tribe of Indians, in accordance with the Act of Congress of June 28th, 1906, supra. That in said Act of Congress, it was provided that all the moneys that should become due, should be held in trust by the United States for a period of twenty-five years from and after the first day of January, 1907, except as otherwise provided. It was otherwise provided in said Act of Congress that the moneys coming due as interest on the trust fund above referred to, should be paid to the members of said Tribe, except in cases of minors, in which event the money should be paid to the parents of said minors until said minors arrived at the age of twenty-one years; provided, that if the Commissioner of Indian Affairs should become satisfied that the interest of said minor was being misused or squandered by said parent, in that event, he may withhold the payment of such interest. It was also provided in said Act of Congress that the royalty received from oil and gas, coal, and
3 other mineral leases on the lands of the Osage Tribe of Indians, and moneys received from sale of townsites, and from sale of certain tracts of land, and moneys received from grazing lands, should be placed in the Treasury of the United States, and the same distributed among the members of the Osage Tribe of Indians, in the same manner and at the same time that the annuity or interest payments were made. The exceptions as to what money should be held in trust by the Government of the United States for twenty-five

years, were the two exceptions—one with reference to the interest on the trust fund, and the other with reference to the royalties received from minerals, and from the sale of certain lands and townsites, and rents received from grazing lands. All other moneys should be held in trust by the Government of the United States. In other words—the funds were divided into the fund that was to be held in trust, and that fund that was to be paid out. The only authority given for withholding the payment of the minors' money, either interest or other moneys provided for, was in case the Commissioner of Indian Affairs should become satisfied that the interest of the minor was being misused or squandered.

4th. That, by virtue of said Act of Congress of June 28th, 1906, supra, W. T. Mosier and Louisa Mosier were given the right to receive the annuities, royalties and other moneys, except the trust fund, of said John C. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, their minor children, unless the Commissioner of Indian Affairs should become satisfied that they were misusing or squandering said money.

For many years prior to the passage of the Act of Con-
4 gress of June 28th, 1906, supra, when all the lands which were the property of the Osage Tribe of Indians, were held in trust by the Government of the United States for said Tribe, and each member of said Tribe had a common interest therein, it was the custom and policy of the Government, in accordance with the long established relationship between the Government and the Osage Tribe of Indians, and under the law authorizing and directing the Secretary of the Interior to pay the annuities or interest and royalties, and rents from grazing lands, to pay the shares of the minor members of said Tribe to the parents of said minors, and in case the parents were misusing or squandering the shares of said minors, then it was the policy and custom of the United States, through its officers, to withhold from said parents the minors' shares until the officers in charge were satisfied that the parents were not misusing or squandering the same; and it was the long established custom and policy, both of the United States and of the Indians, to permit the parents in receiving the funds coming as the shares of their minor children, to use the same as they saw fit, so long as the same were not misused or squandered, and each child's share was not expended, or required to be expended for the special benefit of said child, nor for the particular benefit of any member of the family, but the said parents used the money as their own money, in the transaction of their business affairs, and in the investment of the same, and in providing the means of support for the entire family.

It had long been recognized by the Government, that in order to enable the Indian to successfully cope with his more astute and energetic white brother, and in order to properly educate and raise
his children, and in order to enable him to accumulate prop-
5 erty, that it was necessary for him to have some superior advantage, and in order to give parents of Osage minor children this superior advantage over the white man, it was deemed proper and right to pay to the parent, not only his own income from tribal

sources, but also the income from the minor members of his family, subject, of course, to a wise supervision on the part of the Government that the parents should be required to not misuse or waste said funds.

The Act of Congress of June 28th, 1906, was and is but a continuation of said long established custom and policy of the Government of the United States, and by reason of its enactment, became mandatory upon the Secretary of the Interior to pay to the parents of minor members of the Osage Tribe of Indians the income derived from the shares of said minors, such as interest money on the trust fund, royalties from the mineral interests, moneys received from grazing lands, and the moneys received from the sale of certain lands and properties authorized by said Act. And said Act was so understood and construed at the time of its enactment by the officers of the Government, whose duty it was to enforce the same, and by the parties whose interests were affected by the passage and construction of the same. That long established policy of the Government in dealing with the affairs of the minor Osage Indians, became the statutory law by the passage of said Act of Congress of June 28th, 1906, supra, and for more than ten years thereafter the Secretary of the Interior paid to the parents of the minor members of said Tribe, including the parents for whom this action is brought, all of the income due as interest on the trust fund for said children; all of the royalties received from oil and gas and other min-
6 erals, and from grazing lands, and all of the funds received from the sale of certain townsites mentioned in said Act, and the same stood as the interpretation of said Act of Congress for said period of time by both the Secretary of the Interior and the Osage Tribe of Indians. That since the — day of June, 1917, the Secretary of the Interior has refused and still refuses and will continue to refuse to pay to these parents for whom this action is brought, all the royalties received from oil and gas, but is withholding a part of the same contrary to said Act of Congress, supra. That the Secretary of the Interior now has a large amount of money, the exact amount plaintiff does now know, but alleges it to be more than three thousand dollars, which is money coming from the shares of said minors, which he refuses to pay to W. T. Mosier and Louisa Mosier, although they are entitled to the same.

5th. On April 30th, 1917, with a view of putting a different construction from what had theretofore been put upon said Act of Congress, the Secretary of the Interior issued an order, directing that the parents of minor members of the Osage Tribe of Indians should make a statement showing what use had been made of the money received from the minors' share by such parents, at the quarterly payment previous; and subsequent to that date, to-wit: February 15th, 1918, another order was issued by the Secretary of the Interior with reference to the moneys derived from the children's shares, in which the Secretary of the Interior sought to compel the parents of minor members of the Osage Tribe of Indians, and in particular W. T. Mosier and Louisa Mosier, above referred to, to expend the money received from each child's share, for the special

and sole benefit of said child, and if the said parents did not
7 so expend the money, then it would be deemed by the Commissioner of Indian Affairs to be a misuse or a squander of said money, and further payments from the income of the minor members shares would be withheld from such parents, except the amount of $40.00 per month out of the income of each child's share. That while said order of February 15th, 1918, was directed to each parent of Osage children, yet it was especially directed to W. T. Mosier and Louisa Mosier, for whom this action is brought. It is further made to appear that W. T. Mosier and Louisa Mosier are sober, industrious and frugal people; that they have in nowise misused or squandered the moneys paid to them as parents of said minor members of the Osage Tribe of Indians, and the Commissioner of Indian Affairs has not found that W. T. Mosier and Louisa Mosier have misused or squandered any part of the moneys coming to John T. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, from the shares of said minors, but withholds the same from W. T. Mosier and Louisa Mosier until the said W. T. Mosier and Louisa Mosier show that the interest coming from each minor's funds has been expended solely and only for the benefit of said minor, or that the further payments of the interest of said minors will be expended and used exclusively for the benefit of such minor. That after making a statement, as required, showing that the moneys that have been paid to the said W. T. Mosier and Louisa Mosier, as parents of their said minor children, showing that the moneys so paid were used for the exclusive benefit of each child, the Secretary of the Interior then would only pay to the said W. T. Mosier, and Louisa Mosier that part of the income of said minor children known as the interest on their trust fund, and that part of the royalty received from oil and gas, known as the one-sixth royalty,
8 but refused and still refuses to pay to the said W. T. Mosier and Louisa Mosier that part of the royalty received from oil and gas mineral leases know as "bonus money," and has in the past required the said W. T. Mosier to take out Letters of Special Guardianship on behalf of each of said minors for said money so designated as bonus money, notwithstanding there was and is no authority in law for the appointment of a special guardian of said fund, or for the payment to such special guardian of said fund. In April, 1919, there was made to the members of the Osage Tribe of Indians a payment of royalties from oil and gas minerals, said payment being made from what was designated "bonus money" on said oil and gas leases, but the Secretary of the Interior refused and still refuses to pay to the said W. T. Mosier and Louisa Mosier the amount of said royalty designated as "bonus money," and amounting to $715.00 for each of said children, or a total amount of $2,860.00, and there is now due to the said W. T. Mosier and Louisa Mosier, as parents of said children, another amount of royalty from oil and gas minerals of approximately $500.00 for each of said children, or a total of $2,000.00, which the said Secretary of the Interior refuses to pay to the said W. T. Mosier and Louisa Mosier, and the action of the Secretary of the Interior in so withholding said pay-

ment to W. T. Mosier and Louisa Mosier is contrary to the said Act of Congress of June 28th, 1906, supra; is not warranted by law; is not based upon a finding of the Commissioner of Indian Affairs that said money was being misused or squandered, but is solely and entirely based upon a misinterpretation and misconstruction of said Act of Congress, and contrary to the spirit and intention thereof.

9 As showing the reasons for the order of February 15th, 1918, of the Secretary of the Interior to J. Geo. Wright, Superintendent of the Osage Indian Agency, and in support of the allegation that said moneys were not being withheld from W. T. Mosier and Louisa Mosier because they were misusing or squandering the same, we quote from said order as follows:

"With the view of ascertaining whether moneys belonging to minor Osage Indians were being misused or squandered, you were directed by letter dated April 30, 1917, to require parents to make written accountings of each minor's money received by such parent at the previous quarterly payment, showing what disposition had been made of the funds received, before future payments of minor's shares would be made. This action was taken in view of the provisions contained in Section 4 of the Act of June 28, 1906, (34 Stat. L. 539-545), which reads in part as follows:"

* * * * * * *

"Under date of August August 1, 1917, you were given instructions as to the proper method of construing the order of April 30th, and an interpretation was placed upon the former instruction as to what would constitute a satisfactory showing by the parents of the expenditure of their minor children's funds."

"In connection with the foregoing order, you were requested to endeavor to impress upon parents the fact that the funds of their minor children belonged absolutely to the children, and as such must not be expended either for the sole benefit of the parents or for the benefit of the family in general, but that the expenditures must be for the direct benefit of the minor entitled thereto. I have carefully considered the numerous accountings made by the parents of the expenditure of their children's funds, and I am not satisfied with the showing made."

* * * * * * *

"Under the present system of accounting for the expenditure of the minor's funds, it is impracticable if not quite impossible, to ascertain whether the funds are expended for the direct benefit of the minor entitled thereto, or for the benefit of the family in general. It is apparent from a careful study of the accounts filed that the statements are made without due regard as to the correctness of the expenditures made, but are merely made with the view of meeting the requirements laid down in letter of April 30, and sub-

10 sequent instructions. I am extremely doubtful whether this plan would ever attain the results desired, namely, the ex-

penditure of the funds for the direct benefit of the minor entitled thereto."

"After careful deliberation and analysis of the present system of accounting for the minors' funds, I am convinced that the only equitable solution of the problem lies in the appointment of a legal guardian for each minor, whose expenditures will be supervised and audited by the county court, and to which court the guardian is responsible for the expenditures made. However, under the law, guardians may be appointed for minors whose parents are living, only when the estates of such minors are being misused or wasted. In addition to the control and the proceeds of the allotments of minors, I am of the opinion that $40.00 per month, or $480.00 per year, paid to the parents is sufficient for the maintenance of such minors, and any expenditure over and above this amount will be considered a misuse of the interest of the minor."

"You are, therefore, directed in future to pay to the parents of minor Osages not to exceed the amount of $480.00 for each child for a period of one year, from such minor's share in the oil and gas royalties and interest on trust funds, and you should advise each parent that if the expenditure of a sum in excess of $480.00 per year for each minor child is desired, he should apply to the county court for the appointment of a legal guardian, on the ground that the expenditure of such a sum in the opinion of the Commissioner of Indian Affairs, constitutes a waste and misuse of the minor's interest, as provided in Section 7 of the Act of June 28, 1906, supra."

The above order was also based upon a wrong construction of law, in that there is no authority for the appointment of a guardian of a minor's estate whose parents are living, while the Secretary of the Interior evidently believed that a guardian could be appointed for that purpose, and because of that erroneous belief issued said order.

6th. That the said defendant, the Secretary of the Interior, refuses and will continue to refuse to pay to W. T. Mosier and Louisa Mosier, parents of said John T. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, all the interest and royalties coming from said minors' shares, unless by proper order of this Court, he is commanded to pay the same to said W. T. Mosier and Louisa Mosier.

7th. The plaintiff has no other plain or adequate remedy
11 at law to enforce or secure the payment of said moneys to W. T. Mosier and Louisa Mosier, except by this action.

Wherefore, the petitioner prays that the Court may issue a Writ of Mandamus to the said defendant, requiring and commanding him to pay W. T. Mosier and Louisa Mosier said moneys, or an order requiring him to show why a Writ of Mandamus should not issue to him, commanding and directing him to pay over to said W. T. Mosier and Louisa Mosier, as parents of said John T. Mosier, Edwin P. Mosier, Luther P. Mosier and Agnes C. Mosier, minor members of the Osage Tribe of Indians, all moneys derived as interest on the trust fund of said minors, and all moneys that are received from the shares of said minors as royalties and income from oil and gas and other minerals belonging to said Tribe of Indians; and that a time be fixed in which the said defendant shall show cause why said order

should not issue, and that plaintiff have all other proper relief herein.

W. T. MOSIER, *Petitioner.*
T. J. LEAHY,
C. S. MACDONALD,
G. V. LABADIE,
Attorneys for Plaintiff, of Pawhuska, Oklahoma.

STATE OF OKLAHOMA,
County of Osage, ss:

W. T. Mosier, being first duly sworn upon his oath, says:

That he is one of the above named parties for whom this action is brought; that he has read the foregoing petition and knows the contents thereof; that the allegations therein contained are true.

12 W. T. MOSIER.

Subscribed and sworn to before me this 27th day of May, 1919.

MINNIE McLAUGHLIN,
[SEAL.] *Notary Public.*

Rule to Show Cause.

Filed July 8, 1919.

* * * * * * *

Upon consideration of the petition for mandamus in the above entitled cause, it is ordered on this 8th day of July 1919, that the respondent herein show cause on or before the 25th day of July 1919, at ten o'clock A. M., and in this Court why a writ of mandamus should not issue as prayed for in said petition, provided that a copy of this order be served on said respondent on or before the 9th day of July, 1919.

F. L. SIDDONS,
Justice.

Respondent's Answer.

Filed July 25, 1919.

* * * * * * *

Comes now Franklin K. Lane, Secretary of the Interior, and in answer to relators' petition in the above-entitled action and by way of return to the rule to show cause herein issued, says:

1-3. He admits the averments of paragraphs 1-3, inclusive.

4. He admits that relators, under the act of June 28, 1906, were given the right to receive such funds or moneys belonging to their said minor children, as are directed to be paid by the terms

13 of said act, unless the Commissioner of Indian Affairs should become satisfied that relators were misusing or squandering said moneys.

Answering the averments of the second paragraph of said paragraph 4, he admits that prior to said act of 1906 it was the custom to pay to parents the minors' share of moneys subject to the condition that the same was not misused or squandered, but as to any express statutory authority for such practice he has no knowledge that any such existed; and he says that during the period mentioned in said paragraph the per capita payments were relatively small and sufficient to meet only the reasonable amount of expense incident to living and education, taking the family as a unit; and, in this connection, to what extent the averments in the third paragraph of paragraph 4 are true, he states that he has no knowledge.

Answering the averments of the concluding paragraph of said paragraph 4, he states that as to whether or not the act of June 28, 1906, was and is but a continuation of said custom and policy, in the form of legislation, he is advised, and so avers, that the same presents merely a conclusion of law. He states the facts to be that by the terms of said act he is authorized and required to pay over to the members of the Osage tribe, quarterly, (*a*) interest on the principal trust fund of the tribe, described in section 4 of said act; (*b*) royalty received from oil, gas, coal, and other mineral leases; (*c*) moneys received from the sale of town lots and the sale of three certain reservations, and (*d*) moneys received from grazing land; that such sums of this character as individually represent the
14 shares of minor children are payable to parents until the minor shall have attained the age of twenty-one years unless the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered, in which event he may withhold the payment of such sums; that it is true that for a long time his predecessors in office caused to be paid to the parents of such minors the income of the aforesaid character; but he denies that he has refused, refuses, or will refuse payment of all royalties and that he is withholding the same, save only under such circumstances as the terms of the act of June 28, 1906, require or authorize the same to be withheld. And he states the pertinent facts to be as follows: That at and for some time previous to the passage of said act of 1906, the average yearly income per capita of Osage minors was, as compared with the present, small, being in 1904, $168; in 1905, $343; in 1906, $256; in 1907, $388, and in 1908, $272; that by 1914 the income, through increase in the amounts yielded as roalties on oil and gas properties, had increased to $990.88, but had dropped to $627.30 for the year 1916; that during this period, i. e., prior to 1916, the oil and gas properties were being operated under what is known as the "Foster lease," a lease effected by act of Congress, which terminated March 16, 1916; that under the original lease, from 1896 to 1906, the royalty payable to the Osage Indians was 10 per cent and, under the renewal, from 1906 to 1916, 12½ per cent; that since said time, leases have been made to a great number of operators at increased royalties, to wit, at royalties of one-sixth of the production or, in some instances, one-fifth of the production;

that in addition oil has been enhanced in price and the pro-
15 duction in the Osage field has increased; and that as result-
ing from these facts, the per capita share of royalties per annum has increased like this: during the years ending June 30, 1917, $1,270.16; June 30, 1918, $2,045; June 30, 1919, $2,105. He further avers that for some time prior to 1917, the Commissioner of Indian Affairs was aware of the fact, and the fact was and is, that a very large number of the members of the Osage tribe of Indians are indolent, extravagant, careless in expenditure of money, and improvident; that despite a generous income, greatly in excess of the average income, such Indians as a rule were involved in financial difficulties due to unwise rather than necessary expenditures—in brief, to misuse and squandering of their income; that moved by the desire as well as charged with the duty to see that the income belonging to minor children was not squandered and misused, and being fully aware of the fact that, as alleged in paragraph 4 of the petition, parents of Osage minor children had, in times past, used such money as their own money, the Commissioner of Indian Affairs, with the written approval of the respondent, on April 26, 1917, directed the Superintendent of the Osage Agency to require parents to make a written accounting of each minor's money received by them at the previous quarterly payment, showing what disposition had been made of such payment, and, upon the coming in of such statements, to forward a full report, with recommendation such as the Superintendent deemed necessary, in those instances where proper disposition of the funds was not shown—in which event, said Superintendent would be further directed to withhold the minors' funds as provided in the act of June 28, 1906, aforesaid. He further
states that thereafter, and on July 17, 1917, the Commis-
16 ing December qcarterly payment; which said balance,
under date of August 1, 1917, addressed another communication to said Superintendent, explanatory of his directions of April 26, 1917, copy of which communication is hereto attached, marked Exhibit A, and is made a part of this return. Thereafter, and on February 15, 1918, respondent approved further instructions from said Commissioner to said Superintendent, portions of which are copied in paragraph 5 of the petition, and which, in effect, constitute a direction to pay over to the parents the sum of $40 per month from the minors' share of the quarterly payments, without any accounting, but providing that if larger sums were required for medical or educational purposes or for purchase or improvement of property for the minor, authority might be granted on a suitable showing. And finally, in this phase of the case made, the said Commissioner, on September 12, 1918, directed that quarterly statements from parents showing disposition of minors' share where paid in individual cases in excess of said $40 per month, should be required before further payments were made.

5. Answering such parts of the averments of paragraph 5 as are not covered elsewhere in his answer, he states the facts to be that prior to a date in March, 1919, relators were paid the shares of interest and royalty accruing to their said minor children in full

upon their compliance with the instructions above mentioned and upon their rendering statements showing that they had not squandered or misused said money; that the last statement filed by relator, W. T. Mozier, was dated March 7, 1919, showing that he had properly taken care of the minors' money last paid him and re-
17 questing payment of balance of payment due on the preceding December quarterly payment; which said balance, amounting to $447.75 for each child, was duly paid to him March 10, 1919; that on March 15, 1919, there became credited to each of his said minor children as quarterly shares of interest and royalty moneys, the sum of $572.75 each ($47.75, interest on Osage fund, and $525, royalty on oil and gas), all of which was duly paid to him on March 19, 1919. Yet the said relators at the time of filing said petition herein had not rendered any statement, nor have they since rendered any statement showing in what manner the aforesaid sums of $447.75 and that portion of the March quarterly payment in excess of $120 have been used or expended by them. And while he admits that until the aforesaid dates in March, 1919, the Commissioner of Indian Affairs has been satisfied, from evidence afforded by the relators, that they have not squandered or misused funds belonging to their minor children heretofore paid to them, he is without evidence, through relators' own default, to enable him to find and to say that relators have not misused or squandered moneys of said minors since said March, 1919. But he avers that all portions of interest money and royalties disbursable under the act of June 28, 1906, on account of minor children of the relator, due prior to the filing of this action, have been paid over to said relators, and that any such payments due since the filing of the petition herein, or which may hereafter become due, will be paid to said relators upon proper showing by them made under the regulations and instructions aforesaid.

And answering the further averments in said paragraph 5, relating to "bonus money," set forth on page 7 of the petition, he says
18 that since 1916, certain moneys have been received on account of the oil and gas property of the Osage Nation arising in this manner: That after the expiration of the so-called "Foster lease" in March, 1916, and after leasing portions of said property to operators then in actual possession, pursuing operations, pursuant to a plan adopted by the Council of the Osage tribe with his approval, he caused the Superintendent from time to time to offer oil and gas mining privileges as to other portions of said oil and gas mining property or territory to the highest bidders therefor; that is to say, to the party bidding the highest sum, which is called a "bonus," there would be accorded the right, within a limited territory to be described in a so-called "lease," to drill, excavate, exploit, and do all things necessary for the finding of oil or gas deposits and for the development and production of such deposits as might be found; and if said oil or gas should be found, yielding to said party so making the highest bid, the right to take and remove and sell said oil and gas, for another consideration, to wit, the payment of a fractional portion thereof to the Osage Nation as the same might be

produced; the said fractional portion, called "royalty," being fixed, under said act of 1906, by the President of the United States at one-sixth, or, in certain contingencies, at one-fifth. He further avers that due to the character of the Osage field and to the great demand and high prices for oil, he has been able to obtain for the Osages great sums of money as such "bonus," accruing at irregular intervals; that in August, 1916, the bonus money amounted to $922.69 per capita; by November, $1916, $527.13 additional, per capita; November, 1917, $882.33 additional, per capita; April, 1918, $745 additional, per capita; July, 1918, $575 additional, per
19 capita; October, 1918, $535 additional, per capita; and April, 1919, $715 additional, per capita—in all, $4,902.15 for each enrolled member of said tribe. He further avers that the term "royalty" is a term of definite meaning in oil and gas mining parlance, and is distinct from and, in Indian oil and gas mining leases, does not and never has included, "bonus" money; that when money commenced to accrue from this source, i. e., as bonus money, he sought to place the shares of minors on interest bearing deposit in the United States Treasury, but the Comptroller of the Treasury ruled that interest could not be paid on such funds. Whereupon, and lacking authority under the terms of the act of June 28, 1906, to pay such "bonus money to the parents of such minors, he directed that parents desiring to receive such shares should take out special letters of guardianship, in the proper county court, under the laws of Oklahoma; that relator, W. T. Mozier, did take out such letters and did receive payment of all "bonus" money accruing to his minor children as special guardian, down to and including the October, 1918, payment; that on January 28, 1919, the Supreme Court of Oklahoma decided that there was no authority of law for the appointment of a parent as guardian of Osage minor children by a county court; that in consequence thereof, said relator has no status as guardian to receive the April payments of "bonus" money due on account of his minor children, and, as your respondent is advised and believes and therefore avers that he is without authority of law to make such payment to relators simply as parents, the said payment of $715 on account of each of said minor children has not been made to the relators. He denies that at the time of
20 filing the petition herein, there was due to relators another amount of royalty of approximately $500 per capita, as alleged in paragraph 5 of the petition, or of any amount, which he has refused to pay to said relators. He states that in June, 1919, after the bringing of this action, the regular quarterly payment on account of interest and royalty became due and payable and he avers that the amounts credited to the minor children of relators are payable, and will be paid to relators upon their compliance with the regulations and instructions regulating such payments.

6. Answering the averments of paragraph 6, he states it is not true that, unless by proper order of this court, he will not pay to relators all interest and royalties coming from the minors' shares; on the contrary, he is ready and willing to pay from time to time such amounts as are lawfully disbursable upon relators' compliance with

the needful and proper regulations governing such payments; and he says that until relators do comply with such regulations and do afford as they have heretofore afforded the statements required under the instructions aforesaid, to the end that the Commissioner of Indian Affairs may have the means of determining that relators, unlike altogether too many of Osage parents, are not squandering or misusing the minors' funds, the court should not by mandamus compel the respondent to make in relators' behalf any exception to the operation of the rule beneficial to all Osage minors in that it tends to conserve their estate and to preserve the wasting of their income. And in this connection, he prays the court to notice the fact that oil and gas deposits, the principal source of the wealth of the Osage Nation, are not permanent, but are fugitive and in time become exhausted; that unless there be further legislation to the contrary, the
21 Federal control of this vast business of the Osages will cease in 1931 and the property now withheld will be distributed per capita among the enrolled members of said tribe; that if parents are permitted to take and spend, without any accounting or without any control, the large incomes of their minor children (amounting from all sources to $4,121 per capita for the year 1919) the said minors upon attaining their majority will possess no property other than their reeal estate and such share of the tribal income as may then exist—which, if the oil and gas resources be then exhausted, will be nothing except $191 annual interest on the trust fund.

7. He is advised and so avers that the allegations in paragraph 7 present merely a conclusion of law which he need not answer.

Wherefore having fully answered the petition, he prays that the rule to show cause may be discharged, that the petition may be dismissed, and that he may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

DISTRICT OF COLUMBIA, *ss:*

Franklin K. Lane, Secretary of the Interior, respondent in the above-entitled action, being first duly sworn, says that he has read over the aforegoing answer by him subscribed and knows the contents thereof; that the matters therein set forth he is informed are true and he believes them to be true.

22 FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to this 25 day of July, 1919.
Before me:
[L. S.] W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

(EXHIBIT A.)

Ed—Ind.
11883–17.
L. M. C.

July 17, 1917.

Mr. J. George Wright,
Supt. Osage School.

MY DEAR MR. WRIGHT:

I have received your letter of July 10, with further reference to the method of handling the payment of shares of minors in the regular quarterly payments made to the members of the Osage Tribe, and requesting that you be given instructions.

I have carefully considered your statements as to the manner in which the recent ruling requiring written accountings by the parents as to the disposition of minors' funds, has been received by the members of the tribe. With reference to the question of allowing parents to apply the payments of minors in the erection of homes or other improvements, you are advised that such a procedure does not properly come within the meaning that the funds of minors should be used for their benefit. There is a legal and moral duty resting upon parents to properly support their minor children, and the fact that such minors may have a large income does not relieve the parents of this duty, and I do not believe that the funds of the children should be paid to the parents for such use as stated above. This also applies to the case where parents desire to use the funds of minors in providing subsistence for the family. While it is reasonable that sufficient sums belonging to the minors should be used in providing for their actual needs, I do not believe that their funds should be used in providing for the family in general. If a parent is able to render a specific statement as to the amounts used from each minor's funds for the particular minor's individual benefit, this will enable me to determine as to the propriety of the
23 expenditures. However, I am not satisfied with the general statement that such amounts have been used in support of the family. I believe this position to be for the best interests of the minors, as such action will conserve the income of such minors, and make it possible to use the funds in such a manner as to provide a permanent estate, which may be paid to the minor upon the attainment of majority; otherwise the vast income of minor Osages will be entirely consumed by the parents from which only an indirect benefit will result to the minor, and upon becoming of age, nothing would remain of the income derived during his or her minority.

With reference to your inquiry as to whether the funds of enrolled minors may be used by the parents, where they have no means, in the support and education of unallotted brothers and sisters, you are advised that in such cases, you should submit a full report as to the circumstances in each case, and make a recommendation as to whether, in your opinion, it would be proper to permit of the expenditure desired. I am not inclined favorably to the expenditure of minors' funds in the purchase of automobiles or other such luxuries,

for which there is apparently no necessity. The above policy applies to the cases of parents desiring to use their children's funds in liquidating indebtedness.

I have noted your circular letter to members of the tribe with reference to the above matter, and I approve of your action, and in any case where the expenditure of a minor's share is for any purpose other than the direct benefit of said minor, application should be made to your office, and you should, in turn, submit a full report with your recommendations for requesting authority from this Office, before the expenditure is authorized. You should give careful supervision to this matter, with the view of impressing upon the adult members of the tribe the absolute necessity of living within their own incomes and of becoming independent of the funds accruing to the credit of their minor children.

Sincerely yours,

(Signed) CATO SELLS,
Commissioner.

Approved: Aug. 1, 1917.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

24 *Reply to Respondent's Answer.*

Filed November 1, 1919.

* * * * * * *

Comes now the plaintiff, and for reply to that part of respondent's answer which does not admit the allegations of plaintiff's petition, says:

4th. Replying to the 2nd paragraph of that part of respondent's answer answering paragraph 4 of relators' petition, the relators say:

That it is true that from 1904 until the present time there has been a gradual increase in the amount of moneys received by the members of the Osage Tribe of Indians as royalty from oil and gas leases, and that the rate of royalty has been increased in that time so that now the rate of royalty on oil leases is in some instances one-sixth, and in others one-fifth, and that the right to fix the royalties on oil and gas leases is a right conferred by the Act of Congress of June 28, 1906, upon the President of the United States, and the rates of one-sixth and one-fifth above referred to, together with such bonus as the leases may bring at the time the same are made, is the royalty that has been fixed by the President that leases shall bear.

The relators further admit that there are members of the Osage Tribe of Indians who are indolent, extravagant and careless in the expenditure of money, and improvident, and that they misuse and squandor their income, but the relators say that the fact that there are members of the Osage Tribe of Indians who misuse and squandor the money paid to them as their minor children's shares, is no

reason or excuse why these relators should not be paid the annuities and royalties they are entitled to as their children's shares
25 under said Act of Congress of June 28, 1906, and in accordance therewith.

The relators further say that it is the duty of the Commissioner of Indian Affairs, under the Act of Congress of June 28, 1906, to determine whether or not the parents of minor members of the Osage Tribe of Indians are misusing and squandering the income paid to them as their minor children's shares, and whenever the Commissioner becomes satisfied that such parents are misusing and squandering said fund, then it is the duty of the Secretary of the Interior to withhold the payment of the same to them, and these relators have no objection to the Commissioner of Indian Affairs making investigation as to whether or not they are misusing and squandering their children's funds. But the relators say that the written requirement of April 26, 1917, directing the parents to make written accounting of each minor's money received by them at the previous quarterly payment, and the further requirement dated Aug. 1, 1917, attached to respondent's answer, and marked Exhibit "A", are not authorized by the Act of Congress of June 28, 1906, and are in direct conflict therewith in this, to-wit:

That said Act of Congress of June 28, 1906, directs that the minor children's money shall be paid to the parents unless the parent is misusing or squandering the same, that fact to be determined by the Commissioner of Indian Affairs. Under the above requirements, of Apr. 26, 1917, and Aug. 1, 1917, the parents are required to show that the funds of the children paid to them, under the Act of June 28, 1906, were expended and used for the direct benefit of each particular child, and the parent had no control over the same except insofar as he was expending the same for the use and benefit
26 of such child. So that a requirement such as above stated is not warranted by said Act of Congress, and is in conflict with the duty imposed upon the Commissioner of Indian Affairs requiring him to determine whether the parents are misusing or squandering the same, and the Secretary of the Interior should be directed by mandate of this Court to pay these relators the moneys coming from the shares of the minor members of their family, unless these relators in their use of the same are misusing or squandering them.

5th. Replying to that part of respondent's answer in paragraph 5 of relators' petition, the relators say:

That it is true that for two years last past they have been required to make a showing in accordance with the order of April 26, 1917, and the further order of Aug. 1, 1917, by filing a quarterly statement with the Superintendent of the Osage Indian Agency, showing that the moneys received at the last quarterly payment previous were used for the direct benefit of their children, and that each child's money was used for its own benefit, and upon such a showing they were then paid the children's part of the interest from the trust fund accumulated, and the children's part of the royalty that had accumulated from one-sixth and one-fifth of the production,

as hereinbefore set out, but that the respondent has not permitted for two years last past, and refuses to permit these relators to use said funds derived from the children's share in their own business, in the care of the family in general, and in the education and support of their said children in general.

The relators further say that notwithstanding that the Commissioner of Indian Affairs is satisfied and has been satisfied
27 that these relators have not misused or squandered the funds coming to them from the shares of their said minor children, respondent refuses to pay the same to them, and will continue to refuse to pay the same to them, except upon the showing that said funds are being used for the special benefit of each particular child, and are not being used by these relators in their own business, or for the general welfare of the family.

Relators say that they have been economical and frugal in handling the moneys entrusted to them; that they have wisely invested the same, and are now people of considerable wealth, and have at all times carefully used the funds received by them.

Answering the 2nd paragraph of the respondent's answer to paragraph 5 of relators' petition, the relators say:

That the term "bonus money" as applied to the income from oil and gas properties of the Osage Tribe of Indians, is not a term warranted by the Act of Congress of June 28, 1906, for the purpose of distinguishing between the amount of the income received on the basis of one-sixth and one-fifth of the oil produced and the additional amount of income that is paid for the oil and gas leases at the time they are made, but under said Act of Congress of June 28, 1906, the word "royalty" includes all income derived from the mineral resources of the Osage Tribe of Indians, whether it be a portion of the amount of mineral produced, or whether it be the additional amount paid for the obtaining of a lease at said rate of one-sixth or one-fifth. The income to be derived from the minerals of the Osage Tribe of Indians is an amount to be fixed by the President of the United States, under the Act of Congress of June 28,
28 1906, and is covered by and embraced within the word "royalty" found in said Act. There are but two general character of funds embraced within said Act of Congress of June 28, 1906, to be paid to members of the Osage Tribe of Indians—one is the trust fund, which was to be segregated and placed in the Treasury of the United States to the credit of each individual member of the Tribe, and the other those funds which were to be paid to the members of the Tribe without being placed in the Treasury of the United States, and which were not to be held in trust. The money termed "bonus" has been refused by the Treasurer of the United States as a trust fund on an opinion by the Comptroller to the effect that it was not of that class of funds that could be held to be trust funds, and therefore should be paid out to the parents of minors, except in cases where the parent was misusing or squandering the same.

6th. Replying to that part of respondent's answer in which he answers paragraph 6 of relators' petition, relators say:

That it is true that respondent has refused and still refuses and will refuse to pay them any part of their children's fund known as the "bonus money," under any circumstances or conditions, except under appointment as legal guardian. That the respondent has refused, refuses and will refuse to pay them any part of the other funds of their said minor children except $50.00 per month, unless they make a showing that said funds are being used for the specific benefit of each particular child.

Relators further say that they are not asking to be paid the income derived from their children's shares except in accord-
29 ance with the Act of Congress of June 28, 1906, and that they are ready and willing at all times to make proper showing to the satisfaction of the Commissioner of Indian Affairs that they have not misused or squandered said money, but that they should not be deprived of their right to receive said money and properly use the same, because some other members of the Tribe are misusing and squandering the money that is paid to them from their children's shares, and that the allegations of respondent's answer with reference to what other members of the Tribe are doing, and with reference to the necessity of controlling the funds paid to other members of the Tribe, are not material, as these relators are advised, and have nothing whatever to do with the rights of these relators to receive the funds which they are entitled to receive under said Act of Congress above referred to.

Wherefore, having fully replied to the answer of the respondent, the relators pray that they may have an order requiring the Secretary of the Interior to pay over to them the funds coming from their children's share, as prayed for in their petition.

W. T. MOSIER,
Relator.
G. V. LA BADIE,
LEAHY, MACDONALD, BURNETTE & BRITTON & GRAY,
Attorneys for Relators.

STATE OF OKLAHOMA,
County of Osage, ss:

W. T. Mosier, being first duly sworn upon his oath, says:
That he has read the foregoing reply and knows the contents thereof; that the matters therein set forth are true, as he verily believes.

W. T. MOSIER.

30 Subscribed and sworn to before me this 1st day of October, 1919.

MINNIE McLAUGHLIN,
Notary Public.

[SEAL.]

Stipulation.

Filed November 1, 1919.

* * * * * * *

It is hereby stipulated and agreed by and between the above-named relators and the above-named respondent, by their attorneys and counsel, that the following is a true and correct statement of facts in the above entitled cause, and that together with the averments and allegations of relators' petition and respondent's answer and relators' reply, may be taken as true by the court and judgment rendered thereon accordingly.

1. It is stipulated and agreed that all admitted facts in the pleadings are true. But it is understood that the respondent does not hereby admit as true the following allegations in relators' replication to the answer, save as herein stated, to wit:

(*a*) The allegation in the third paragraph, page 1, that the rates of one-sixth and one-fifth royalty, "together with such bonus as the leases may bring at the time the same are made, is the royalty that has been fixed by the President that leases shall bear;"

(*b*) The allegation in the last paragraph on page 3, to the effect that the Commissioner of Indian Affairs "is satisfied and has been satisfied that these relators have not misused or squandered the funds coming to them from the shares of their said minor children," although he does admit that at no time prior to the rendition of accounts by the relators under the order of April 26, 1917, did
31 the said Commissioner ever determine that they had misused or squandered said funds; that during the period while such accounts were rendered by the relators, said accounts showed that all the money paid to relators on account of their minor children was either providently expended for the direct use and benefit of said minors or was invested or retained for the ultimate use and benefit of said minors, and that during said period it is true that the Commissioner did not determine that relators were misusing or squandering said funds; but that during the period since relators have neglected and refused to render any accounting, the Commissioner has been without any information on which to make any determination.

(*c*) The allegations in the first paragraph on page 4, as to the manner in which relators have handled the money entrusted to them, if by that is meant the moneys paid to them on account of their minor children, other than during the period when relators made accounting to the Commissioner as set forth in the preceding paragraph *b*; and

(*d*) The allegations in paragraph 3, page 4, concerning "bonus money" in the respects in which said allegations may differ from the averments in respondent's answer.

2. It is admitted that the Commissioner of Indian Affairs has never at any time before or after the orders of April 26, 1917, or Au-

gust 1, 1917, made a finding that these relators misused or squandered the money paid to them from their minor children's shares; the circumstances in this respect being as hereinbefore set forth in this stipulation.

3. It is stipulated and agreed that at all times prior to April 26, 1917, these relators used the funds paid to them from the shares of their minor children, in their own business affairs, and in
32 the care and education of their minor children, and in the support of the family in general, and that since April 26, 1917, the Secretary of the Interior has refused to pay to them the shares of their minor children's income, except upon a showing that said income was being used for the specific benefit of each particular child, in accordance with requirements dated April 26, 1917, and August 1, 1917.

4. The term "bonus money," not found in the act of June 28, 1906, is a term designating money received from the highest bidder for the privilege of securing an oil and gas mining lease of a particular tract.

T. J. LEAHY,
F. W. CLEMENTS,
Attorneys for Relators.
CHARLES D. MAHAFFIE,
C. EDWARD WRIGHT,
Attorneys for Respondent.

Memorandum.

March 24, 1920.—Order substituting John Barton Payne as respondent in place and stead of Franklin K. Lane.

Opinion of Court.

Filed May 19, 1920.

* * * * * * *

This case came on for final hearing upon the pleadings and an agreed statement of facts, and was argued by counsel for the respective parties and submitted.

The action is one for a Writ of Mandamus to require the
33 Secretary of the Interior to pay to the Relators, as the parents of certain minor children who are duly enrolled members of the Osage Tribe of Indians,

"all moneys derived as interest on the trust fund of said minors, and all moneys that are received from the shares of said minors as royalties and income from oil and gas and other minerals belonging to said Tribe of Indians."

Two questions are presented by the case. One is whether money derived from the successful bidder for an oil lease of land belonging to the minor children of the Relators, such money being called

"bonus money," is payable to the Relators, as the royalty prescribed in the lease itself is payable to them. And the other question is whether the Respondent can limit the amount of moneys that may be received by the parents of said minor children or require the Relators to render statements of account of moneys received by them, in order that the Commissioner of Indian Affairs may satisfy himself that such moneys are not being misused or squandered by the Relators, or that if they are that further payments may be withheld.

These questions are to be answered by a consideration of the provisions of the Act of Congress, approved June 28, 1906, 34 Statutes, page 544.

This Act is a comprehensive piece of legislation having for its object the division of the lands and funds of the Osage Indians in the then Territory of Oklahoma, and it is so entitled. In effecting its object striking evidence of its policy with respect to the interests of minors having living parents, is manifest. By section 2 of the Act it is provided that selections of the lands belonging to such minors "may be made by said parents," and by the proviso of section 7, it is enacted "that parents of minor members of
34 the tribe *shall have the control and use of said minors' lands, together with the proceeds of the same,* until said minors arrive at their majority." (Underscoring by the Court) Section 4 provides that the interest to be paid by the United States on certain funds and moneys belonging to minors and held in trust for them by the government "shall be paid quarterly *to the parents* until said minors arrive at the age of twenty-one years." And by the same section it is provided that royalty received from oil and other mineral leases upon the land selected and divided as stated above, and moneys received from the sale of other specified lands shall be distributed to the individual members of the Osage Tribe "in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States."

It seems clear from the foregoing resume of the material portions of the statute under consideration that it was the intention of the Congress to give to the *parents* of minor members of the Tribe the *beneficial use* of so much of their Children's property as is to be divided and distributed under the terms of the law, during the children's minority. But it is insisted by the Respondent that the socalled bonus money was not included in the distribution thus directed. Not in terms, it is true, but at the time of the enactment of the statute the practice of obtaining bonus money had not made its appearance, and did not do so until a decade later when the increasing demand for oil which it was believed existed in large and paying quantities under the surface of these Indian lands, suggested the plan of requiring prospective oil lessees to bid for leases, and the sums paid by the successful bidders for leases constitute
35 the bonus money. This money may not be royalty in the strict sense of the word, but it is certainly money derived from "oil * * * leases upon the lands," to quote the language

of the statute. No leases, no royalty. No leases, no bonus. Leases, bonus certainly, royalty perhaps, if the minerals are discovered to exist in paying quantities.

The Supreme Court has furnished us with a legal definition of the word bonus. In the case of Kendicott vs. The Supervisors, 16 Wallace, 452, 471, the Court says,

"But, secondly, the meaning of the word bonus is not that given to it by the objection. It is thus defined by Webster; 'A premium given for a loan or a charter or other privilege granted to a Company; as the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation.' It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given."

Applying that definition in the instant case it is apparent that the bonus derived from the leases is "a sum paid * * * upon a consideration in addition to or in excess of that which would ordinarily be given," the latter being royalty in its strict sense.

But did the Congress use the word in the restricted sense? It was providing in a complete manner for the making of oil and other mineral leases upon the lands of the Indians, and directed that the proceeds be distributed to the owners thereof, and in the case of minor owners the proceeds were to go, during their minority, to the parents of such minors. There is no evidence in the statute that any proceeds derived from the leases were not to be distributed as directed, except as enacted in the first proviso of section 4, hereafter to be considered in connection with the second of the two questions which this case raises.

36 The Court is of the opinion that Congress did not use the word royalty in the restricted sense, but used it in the sense of the word, "proceeds," to be distributed in the way directed. The whole scheme and structure of the Act justifies and requires this interpretation. What reason of the apparent policy of the law suggests a different interpretation? None. It gives to the parents of minors the control and *use* of the minors' lands and as well the proceeds of the same. It gives to them the royalty received from the oil leases and all other mineral leases upon said lands. What else more could it give, except complete ownership and title?

This in effect is the conclusion reached by the Comptroller of the Treasury in the following language:

"I am constrained to decide that, within the purpose and meaning of the act, bonus money received from the sale of leases for oil, etc., *should be classed with royalties* and which is required by the second exception to section 4 *to be placed in the Treasury* to the credit of the members of the Osage Tribe of Indians as other moneys of said tribes are to be deposited, *for distribution to the individual members of said Osage Tribe,* and therefore that said bonus moneys do not bear interest."

23 Decisions of Comptroller of the Treasury, Pages 483, *486.*

(Underscoring by the Court.)

For the foregoing reasons the answer to the first of the two ques-

tions propounded is, that the so-called bonus money is payable to the Relators as a part of the royalty received from oil leases.

Coming now to the second question to be answered, it is to be observed that the contention of the Respondent in this respect rests upon his interpretation of the first proviso of section 4 of the Statute; That proviso is in the following language: "Provided, That if the Commissioner of Indian Affairs becomes satisfied that the
37 said interest of any minor is being misused or squandered he may withhold the payment of such interest."

The Respondent's interpretation of this proviso takes the form of a limitation upon the use by the parents of a minor of the money of the latter paid to the former, both in respect of the amount and its application. He insists that such money can be used only for the benefit of the minor exclusively, and if not so used it would be deemed by the Commissioner of Indian Affairs as a misuse or a squander of said money, and further payments would be withheld except to the amount of $40.00 per month.

In the opinion of the Court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money, as they are to have the use of the minors' lands and the proceeds of the same. A use, no doubt, that shall be wise, and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens.

To use these funds in hazardous or speculative undertakings or in lavish and extravagant expenditures would be to misuse or squander them, and in that event the restraining hands of the Commissioner of Indian Affairs could and should be laid upon them. These are the possibilities that the limitation of the proviso is designed to guard against. It was not intended to clothe the Commissioner or the Respondent with authority to dictate the limit of the amount that the parents could expend *exclusively* upon their minor children from these moneys. The Statute makes the parents, not the Commissioner or the Respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used
38 in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant. But in order that the Commissioner may inform himself as to whether the limitation of the proviso, *as its boundaries have been marked out herein,* are observed by the parents of the minors, it will not be an unreasonable exaction to require them to furnish him periodically with full statements of the expenditure by them of the moneys of their minor children received by them pursuant to the provisions of the Statute that we have been considering.

The conclusion is that the second question must be answered to the effect that the Respondent cannot limit the amount to be paid to the Relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of Accounts showing in detail the expenditure of the moneys so received. With this limi-

tation on the scope of the Writ of Mandamus prayed for, it will issue as prayed.

And it is so ordered.

F. L. SIDDONS,
Justice.

May 19th, 1920.

Supreme Court of the District of Columbia.

Wednesday, June 16th, 1920.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * * * *

The above case came on to be heard upon the pleadings and an agreed statement of facts, and after argument by counsel, was submitted to the Court, whereupon, the same being considered, it is this 16th day of June, 1920, ordered and adjudged that the prayers of the petition be and the same are hereby granted and the writ of mandamus be issued herein directed to the respondent, commanding him to deliver, or cause to be delivered to the plaintiffs all the moneys due their minor children, members of the Tribe of Osage Indians of Oklahoma, by reason of the distributions made in virtue of the act of June 26, 1906 (34 Stats., 539), prior to the filing of the bill in this cause including their respective shares of bonus moneys distributable as royalties under said Act.

39

Further, that the petitioners recover from the respondent the costs of suit and have judgment therefor as the same are taxed by the clerk.

From the foregoing judgment, the respondent, on the day aforesaid, in open court, notes an appeal to the Court of Appeals of the District of Columbia, and the same is hereby allowed; and pending said appeal it is further ordered that the judgment aforesaid be, and is hereby stayed, and no writ shall run thereon against the respondent until further order of the Court.

40 *Assignment of Errors.*

Filed June 16, 1920.

* * * * * * *

In the rendition of judgment in the above-entitled cause, the court erred—

(1) In granting the writ of mandamus.

(2) In holding that "bonus" money, i. e., money paid by a lessee for the privilege of a lease made under the provisions of the act of June 28, 1906 (34 Stat., 539), is "royalty" within the meaning of said act.

(3) In holding that the money or income from the share of an Osage minor, payable under said act to the parent during the minority of the child, is in effect the money or property of the parent, to be used by the parent as his own in the upkeep of the family.

(4) In failing to hold that a minor's money is not the money of the parent, and that the use of it by a parent as his own, spending it for the benefit of others than the minor child, is a misuse of the money within the meaning of the proviso to section 4 of the act.

(5) In reviewing the Commissioner of Indian Affairs in a matter committed by law to the latter's discretion and in directing the substitution of his judgment for that of the Commissioner.

(6) In not holding that the respondent may lawfully pay out, under the act of June 28, 1906, only such funds as are particularly directed by said act, and that the term "royalty," as used in said act, does not include cash paid by way of "bonus."

(7) In granting broadly the writ prayed for, after holding and deciding that the respondent has a legal right to exact periodically a full statement from the parents showing their expendi-
41 tures of the minor's money in order to enable the Commissioner to determine whether such expenditures indicate misuse or squandering of said money, on a record wherein it appears that the relators have not rendered such an accounting since the last payment made to them and, on the contrary, have neglected and refused to render any such statement.

(8) In not dismissing the petition and denying the writ of mandamus.

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

Designation of Record.

Filed June 16, 1920.

* * * * * * *

In making up the transcript of record in the above-entitled cause, the Clerk will please to include:

1. The petition.
2. The rule to show cause.
3. The respondent's answer, including exhibits.
4. The replication.
5. The stipulation as to facts.
6. The order substituting John Barton Payne as respondent.
7. The opinion of the court.

8. The judgment, with memorandum of appeal and its allowance.
9. The assignment of errors.
42 10. This designation.

C. EDWARD WRIGHT,
Attorney for Respondent.

Service acknowledged June 16, 1920.

F. W. CLEMENTS,
Attorney for Relators.

43 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 42, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 62494 at Law, wherein The United States of America, on the relation of W. T. Mosier and Louisa Mosier are Plaintiffs and Franklin K. Lane, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of July, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
E. W.,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3422. John Barton Payne, Secretary of the Interior, appellant, vs. The United States of America on the relation of W. T. Moser and Louisa Moser. Court of Appeals, District of Columbia. Filed Jul. 8, 1920. Henry W. Hodges, Clerk.

27 Wednesday, October 6th, A. D. 1920.

JOHN BARTON PAYNE, SECRETARY OF THE Interior, appellant,
vs.
THE UNITED STATES OF AMERICA ON THE relation of W. T. Mosier and Louisa Mosier. } No. 3422.

The argument in the above-entitled cause was commenced by Mr. C. E. Wright, attorney for the appellant.

Thursday, October 7th, A. D. 1920.

JOHN BARTON PAYNE, SECRETARY OF THE Interior, appellant,
vs.
THE UNITED STATES OF AMERICA ON THE relation of W. T. Mosier and Louisa Mosier. } No. 3422.

The argument in the above-entitled cause was continued by Messrs. T. J. Leahy and F. W. Clements, attorneys for the appellees, and was concluded by Mr. C. E. Wright, attorney for the appellant.

28 In the Court of Appeals of the District of Columbia.

JOHN BARTON PAYNE, SECRETARY OF THE Interior, appellant,
vs.
THE UNITED STATES OF AMERICA OF THE relation of W. T. Mosier and Louisa Mosier, appellees. } No. 3422.

Opinion.

Mr. Justice Robb delivered the opinion of the court.

Appeal from a judgment in the court below directing the issuance of a writ of mandamus requiring the Secretary of the Interior to pay appellees moneys derived as interest on a trust fund belonging to their minor children and moneys received from the shares of those minors as royalties and income from oil, gas, and other minerals belonging to the Osage Tribe of Indians, to which appellees belong.

Being satisfied with the reasoning and conclusions of the learned trial judge, we adopt his opinion, as follows:

This case came on for final hearing upon the pleadings and an agreed statement of facts, and was argued by counsel for the respective parties and submitted.

The action is one for a writ of mandamus to require the Secretary of the Interior to pay to the relators, as the parents of certain minor children who are duly enrolled members of the Osage Tribe of Indians,

"all moneys derived as interest on the trust fund of said minors, and all moneys that are received from the shares of said minors as royalties and income from oil and gas and other minerals belonging to said Tribe of Indians."

Two questions are presented by the case. One is whether money derived from the successful bidder for an oil lease of land belonging to the minor children of the relators, such money being called
29 "bonus money," is payable to the relators, as the royalty prescribed in the lease itself is payable to them. And the other question is whether the respondent can limit the amount of moneys that may be received by the parents of said minor children or require the relators to render statements of account of moneys received by them, in order that the Commissioner of Indian Affairs may satisfy himself that such moneys are not being misused or squandered by the relators, or that if they are that further payments may be withheld.

These questions are to be answered by a consideration of the provisions of the act of Congress approved June 28, 1906, 34 Statutes, page 544.

This act is a comprehensive piece of legislation having for its object the division of the lands and funds of the Osage Indians in the then Territory of Oklahoma, and it is so entitled. In effecting its object striking evidence of its policy with respect to the interests of minors having living parents is manifest. By section 2 of the act it is provided that selections of the lands belonging to such minors "may be made by said parents," and by the proviso of section 7 it is enacted "that parents of minor members of the tribe *shall have the control and use of said minors' lands, together with the proceeds of the same*, until said minors arrive at their majority." (Underscoring by the court.) Section 4 provides that the interest to be paid by the United States on certain funds and moneys belonging to minors and held in trust for them by the Government "shall be paid quarterly to the parents until said minors arrive at the age of twenty-one years." And by the same section it is provided that royalty received from oil and other mineral leases upon the land selected and divided as stated above, and moneys received from the sale of other specified lands shall be distributed to the individual members of the Osage Tribe "in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States."

It seems clear from the foregoing résumé of the material portions of the statute under consideration that it was the intention of the Congress to give to the parents of minor members of the tribe the beneficial use of so much of their children's property as is to be divided

and distributed under the terms of the law, during the children's minority. But it is insisted by the respondent that the so-called bonus money was not included in the distribution thus directed. Not in terms, it is true, but at the time of the enactment of the statute the practice of obtaining bonus money had not made its appearance, and did not do so until a decade later, when the increasing demand for oil, which it was believed existed in large and paying quantities under the surface of these Indian lands, suggested the plan of requiring prospective oil lessees to bid for leases, and the sums paid by the successful bidders for leases constitute the bonus money. This money may not be royalty in the strict sense of the word, but it is certainly money derived from "oil * * * leases upon the lands," to quote the language of the statute. No leases, no royalty. No leases, no bonus. Leases, bonus certainly, royalty perhaps, if the minerals are discovered to exist in paying quantities.

The Supreme Court has furnished us with a legal definition of the word bonus. In the case of Kendicott vs. The Supervisors, 16 Wallace, 452, 471, the court says:

"But, secondly, the meaning of the word bonus is not that given to it by the objection. It is thus defined by Webster: 'A premium given for a loan or a charter or other privilege granted to a company; as the bank paid a *bonus* for its charter; a sum paid in addition to a stated compensation.' It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given."

Applying that definition in the instant case it is apparent that the bonus derived from the leases is "a sum paid * * * upon a consideration in addition to or in excess of that which would ordinarily be given," the latter being royalty in its strict sense.

But did the Congress use the word in the restricted sense? It was providing in a complete manner for the making of oil and other mineral leases upon the lands of the Indians, and directed that the proceeds be distributed to the owners thereof, and in the case of minor owners the proceeds were to go, during their minority, to the parents of such minors. There is no evidence in the statute that any proceeds derived from the leases were not to be distributed as directed, except as enacted in the first proviso of section 4, hereafter to be considered in connection with the second of the two questions which this case raises.

The court is of the opinion that Congress did not use the word royalty in the restricted sense, but used it in the sense of the word "proceeds," to be distributed in the way directed. The whole scheme and structure of the act justifies and requires this interpretation. What reason of the apparent policy of the law suggests a different interpretation? None. It gives to the parents of minors the control and *use* of the minors' lands and as well the proceeds of the same. It gives to them the royalty received from the oil leases and all other mineral leases upon said lands. What else more could it give, except complete ownership and title?

This, in effect, is the conclusion reached by the Comptroller of the Treasury in the following language:

"I am constrained to decide that, within the purpose and meaning of the act, bonus money received from the sale of leases for oil, etc., *should be classed with royalties* and which is required by the second exception to section 4 *to be placed in the Treasury* to the credit of the members of the Osage Tribe of Indians as other moneys of said tribes are to be deposited, *for distribution to the individual members of said Osage Tribe*, and therefore that said bonus moneys do not bear interest."

23 Decisions of Comptroller of the Treasury, pages 483, *486*.

(Underscoring by the court.)

For the foregoing reasons the answer to the first of the
31 two questions propounded is, that the so-called bonus money is payable to the relators as a part of the royalty received from oil leases.

Coming now to the second question to be answered, it is to be observed that the contention of the respondent in this respect rests upon his interpretation of the first proviso of section 4 of the statute; that proviso is in the following language: "Provided, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest."

The respondent's interpretation of this proviso takes the form of a limitation upon the use by the parents of a minor of the money of the latter paid to the former, both in respect of the amount and its application. He insists that such money can be used only for the benefit of the minor exclusively, and if not so used it would be deemed by the Commissioner of Indian Affairs as a misuse or a squander of said money, and further payments would be withheld except to the amount of $40.00 per month.

In the opinion of the Court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money, as they are to have the use of the minors' lands and the proceeds of the same—a use, no doubt, that shall be wise, and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens.

To use these funds in hazardous or speculative undertakings or in lavish and extravagant expenditures would be to misuse or squander them, and in that event the restraining hands of the Commissioner of Indian Affairs could and should be laid upon them. These are the possibilities that the limitation of the proviso is designed to guard against. It was not intended to clothe the commissioner or the respondent with authority to dictate the limit of the amount that the parents could expend exclusively upon their minor children from these moneys. The statute makes the parents, not the commissioner or the respondent, the judges in the first instance of the

judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant. But in order that the commissioner may inform himself as to whether the limitation of the proviso, as its boundaries have been marked out herein, are observed by the parents of the minors, it will not be an unreasonable exaction to require them to furnish him periodically with full statements of the expenditure by them of the moneys of their minor children received by them pursuant to the provisions of the statute that we have been considering.

The conclusion is that the second question must be answered to the effect that the respondent can not limit the amount to be paid to the relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of accounts showing in detail the expenditure of the moneys so received. With this limitation on the scope of the writ of mandamus prayed for, it will issue as prayed.

And it is so ordered.

F. L. SIDDONS,
Justice.

The judgment is affirmed, with costs.

32 In the Court of Appeals of the District of Columbia.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, appellant,
vs.
UNITED STATES EX REL. W. T. MOSIER ET AL. } No. 3422.

Dissenting opinion by Mr. Chief Justice Smyth.

This appeal is not for the purpose of determining finally the rights of the parents and the children to the money in question. We may inquire only as to whether the Secretary's decision has any support in the record. If it has, then his judgment, not ours, must prevail; in other words, unless he acted arbitrarily, we may not disturb his conclusion. Ashley v. Roper, 48 App. D. C., 69; Brougham v. Blanton Manufacturing Co., 149 U. S., 495, and Sykes v. Lane, 47 W. L. R., 299. In the recent case of the United States Ex Rel. Hall v. Payne, decided December 13, 1920, the Supreme Court of the United States said that where the action of the Secretary "was not arbitrary or capricious, but rested on a possible construction of the act," it would be affirmed.

The controversy seems to hinge upon whether or not a bonus is necessarily within the meaning of the word "royalties." It is according to the opinion of the court, but the definition of a bonus given therein does not support its conclusion. It says that a bonus may be considered as a "sum paid * * * upon a consideration in

addition to or in excess of that which would ordinarily be given." The record shows that royalty is what would ordinarily be given. A bonus is something in excess of it. Does not the statute lend itself to this interpretation?

33 Moreover, is there not room for the belief that, as applied to oil lands, a royalty does not include a bonus? A writer upon the subject says: "The consideration which the lessee pays for the lease must not be confounded with the consideration which the lessor is to receive for the oil and gas. The cash consideration, bonus, or whatever it may be called, paid or agreed to be paid by lessee for the lease, is a consideration for the exclusive privilege of entry for exploration. * * * When lessee discovers oil or gas in paying quantities, his right to produce them becomes a vested right. He is then, for the first time, authorized and obligated to pay the consideration to lessor for the exclusive vested right to produce the oil and gas, the true consideration for such minerals being the royalty of oils and cash rental for gas, as the case may be." Archer's Law and Practice in Oil and Gas Cases, page 44. See also Brookshire Oil Co. v. Casmalia Oil and Development Co., 103 Pac., 927, and Venture Oil Co. v. Fretts, 152 Pa., 451. This clearly indicates that there is a wide difference between a royalty and a bonus.

For the purpose of interpreting the act we may look at the conditions existing, and presumably known to Congress, at the time it was passed. United States v. Union Pacific R. R. Co., 91 U. S., 72; Siemens's Administrator v. Sellers, 123 U. S., 276, and Smith v. Townsend, 148 U. S., 490. At that time bonuses were not resorted to in the Osage country. They did not come into existence until the expiration in 1916 of what is known as the Foster leases, hence were not within the contemplation of Congress at that time. Of course, if the language used clearly embraces them, the fact that they were not then in vogue would be, perhaps, immaterial; but if it does not, the Secretary, as the person charged with the administration of the act, would be justified under the circumstances, to
34 be noticed immediately, in refusing to stretch the language so as to include them.

When the act was passed the portion which each child derived from its lands annually was about $256—not more than was necessary for its support—but in 1920 the sum coming to it from interest and royalty alone was about $3,551, and from bonuses $4,730, making a total of $8,821 a year. May it not be said with reason that while Congress was willing to entrust to the parents annually $256, or thereabouts, for each minor child, to be used for its benefit—for we can not assume, in the absence of a specific direction on the subject, that Congress intended that the child's money should be used for any other purpose—it was not within its contemplation that the parents should have more than the support and education of the child required. The act provides in specific language for the payment to the parents of the royalties, and that must be done, though the

amount is now much greater than then. But, unless bonuses come clearly within the definition of "royalties," and I have shown they do not, would it not be greatly in the interest of the child if this fund arising from bonuses, like other funds covered by the act, should be conserved by being deposited on interest until the child had reached its majority? Why did Congress provide for the payment of some of the child's money to the parents and for the deposit of the remainder during the child's minority unless it was intended that only so much as was necessary for the purposes of the child should be available to the parents? Considering the statute in the light of these circumstances I do not think it can be correctly said that the Secretary acted arbitrarily in holding that it would be more in keeping with the congressional purpose, as expressed in the act, to
35 treat bonuses as a fund, not to be distributed as royalties, but to be deposited in the Treasury as other funds are required to be deposited under the act, or to be conserved in some other way, during the minority of the child.

The proviso giving to the Commissioner of Indian Affairs the right to withhold payments from the parents if he becomes satisfied that the money is being misused or squandered, carries with it the incidental right to make such rules and regulations as may be necessary to effectively carry out the purposes of the act. "Misused" means not used for the proper purpose. It is the minor's money that is paid to the parents, and, if used for the benefit of anyone else, it is misused. To require that an account should be rendered to the commissioner showing the purposes for which the money was spent seems to be within the scope of the Secretary's authority under the statute, and hence he would be justified in withholding payments so long as the parents refused to make such statements.

Believing that the Secretary did not act arbitrarily, but within the discretion lodged in him by Congress, I think the judgment of the lower court should be reversed, and hence I dissent.

36 Monday, January 3rd, A. D. 1921.

January Term, 1921.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, appellant,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF W. T. Mosier and Louisa Mosier.

No. 3422.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and

adjudged by this court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB.

January 3, 1921.

Mr. Chief Justice Smyth dissents.

37 In the Court of Appeals of the District of Columbia.

Jan. T., 1921.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR,
v.
U. S. EX REL. W. T. MOSIER ET AL. } No. 3422.

Petition for allowance of writ of error.

Comes now John Barton Payne, Secretary of the Interior, appellant in the above entitled cause, by his attorneys, and respectfully shows that on or about the 3rd day of January, 1921, this court entered a judgment herein in favor of the appellees and against the appellant, affirming a judgment of the Supreme Court of the District of Columbia in favor of said appellees, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellant, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellant further shows that the said judgment of this court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of section 250 of the Judicial Code in that the jurisdiction of the trial court to review the appellant and to grant the writ of mandamus prayed in behalf of appellees is in issue.

The appellant further shows that said judgment is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said section 250, in that the validity of an authority exercised under the United States and the ex-
38 istance and scope of a power or duty of the appellant, an officer of the United States, are drawn in question.

The appellant further shows that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250, in that the proper construction of an act of Congress, to wit, the act of June 28, 1906 (34 Stat., 539), is drawn in question by the appellant, who was the defendant below:

Wherefore he prays that a writ of error may issue removing this cause to the Supreme Court of the United States for the correction of the errors assigned; that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the

Supreme Court of the United States; and that the mandate of this court be stayed until further order.

JOHN BARTON PAYNE,
Secretary of the Interior.

By his attorneys:
CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

39 In the Court of Appeals of the District of Columbia.

January T., 1921.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR,
v.
U. S. EX REL W. T. MOSIER ET AL. } No. 3422.

Assignment of errors.

Come now the appellant by his attorneys and says that in the record and proceedings of the Court of Appeals had herein, and in the rendition of the final judgment in the above-entitled cause, manifest error has intervened to the prejudice of the appellant, in this, to wit:

1. That the court erred in affirming the judgment granting appellees the writ of mandamus.

2. That the court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the act of June 28, 1906, a statute which it was his duty to administer, and to require the substitution of the court's judgment as to the construction of said statute for his own.

3. That the court erred in holding that "bonus" money, i. e., money paid by a lessee for the privilege of a lease made under the provisions of the act of June 28, 1906 (34 Stat., 539), is "royalty" within the meaning of said act.

40 4. That the court erred in holding that the money or income from the share of an Osage minor child, payable under said act to the parent during the minority of the child, is in effect the money or property of the parent, to be used by the parent as his own in the upkeep of the family or in his own business, and in failing to hold that said money is the minor's money and that any use thereof for the benefit of others than said minor is a misuse of the money within the meaning of the proviso to section 4 of said act.

5. That the court erred in granting broadly the writ prayed for, after holding and deciding that appellant has a legal right to exact periodical statements from parents showing their use of the minor's

money in order to enable the Commissioner of Indian Affairs to determine whether said money has been misused or squandered, on a record which shows that the appellee had rendered no such accounting since the last payment made to them and had neglected and refused to render such a statement.

6. That the court erred in not reversing the lower court and directing that the petition for mandamus should be dismissed.

JOHN BARTON PAYNE,
Secretary of the Interior.

By his attorneys:
CHARLES D. MAHAFFIE, *Solicitor,*
C. EDWARD WRIGHT, *Assistant Attorney.*

(Endorsed:) No. 3422. John Barton Payne, Secretary of the Interior, appellant, vs. U. S. ex rel. W. T. Mosier et al. Petition for writ of error and assignment of errors. Court of Appeals of the District of Columbia. Filed January 12, 1921. Henry W. Hodges, clerk.

41 Friday, January 14th, A. D. 1921.

JOHN BARTON PAYNE, SECRETARY OF THE Interior, appellant,
vs.
THE UNITED STATES OF AMERICA ON THE relation of W. T. Mosier and Louisa Mosier.
No. 3422.

On consideration of the petition for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the United States, it is ordered by the court that said writ issue as prayed. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between John Barton Payne, Secretary of the Interior, appellant, and the United States of America on the relation of W. T. Mosier and Louisa Mosier, appellees, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 14th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

43 UNITED STATES OF AMERICA, *ss:*

To the United States of America on the relation of W. T. Mosier and Louisa Mosier, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John Barton Payne, Secretary of the Interior, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Constantine J. Smyth, chief justice of the Court of Appeals of the District of Columbia, this 14th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service acknowledged Jan. 18, 1921.

F. W. CLEMENTS,
Counsel for W. T. Mosier et al.

44 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John Barton Payne, Secretary of the Interior, appellant, vs. The United States of America on the relation of W. T. Mosier and Louisa Mosier, No. 3422, January

term, 1921, as the same remain upon the files and records of sa
Court of Appeals.

In testimony whereof I hereunto subscribe my name and af
the seal of said Court of Appeals at the city of Washington th
18th day of January, A. D. 1921.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

(Indorsement on cover:) File No. 28050. District of Columb
Court of Appeals. Term No. 693. John Barton Payne, Secreta
of the Interior, plaintiff in error, vs. The United States of Ameri
on the relation of W. T. Mosier and Louisa Mosier. Filed Janua
21, 1921. File No. 28050.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

ALBERT B. FALL, *Secretary of the Interior*, Plaintiff in Error,
v.
UNITED STATES *ex rel.* WILLIAM T. MOSIER *et al.*
No. 205.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

This case involves a petition for writ of mandamus requiring the plaintiff in error to pay to the defendants in error certain moneys belonging to their minor children, who are members of the Osage Tribe of Indians. An answer was filed (Record, p. 8). To this defendants in error, hereinafter called relators, filed a replication traversing some of the matters of defense set up in the answer (Record, p. 15). A stipulation as to the facts was subsequently filed (Record, p. 19) and the case thus made was argued. The trial court, after having disposed of the issues in an opinion found on pages 20 *et seq.* of the record, entered a judgment allowing the writ. The Court of Appeals of the District of Columbia affirmed this

judgment, the majority of the court adopting the opinion of the trial judge (Record, p. 27). The Chief Justice, however, dissented, and his opinion is found on pages 31 to 33 of the record. A writ of error brings the case to this court.

THE FACTS.

By act of Congress approved June 28, 1906 (34 Stat., 544), a division of the Osage Indian lands, then held by the tribe in common, was directed. A final roll was made, and there were found to be 2,229 members—men, women, and children—who were to be what we may denominate "shareholders." The relators are among these shareholders. They are the parents of four minor shareholders—numbers 1569, 1570, 1571, and 1572 on final rolls. This action involves the payment of money due these four minor shareholders.

Section 2 of the act divided the lands among the shareholders. With the exception of certain reservations, the lands theretofore held in common were individualized by allotment; but by the seventh paragraph of the section, oil, gas, coal, and other mineral deposits were excepted from the operation of that section and were not to become the property of the individual owners of the land in which they might be found until the expiration of 25 years unless otherwise provided by Congress. Congress has since extended the period of ownership in common to April 7, 1946 (Act of March 3, 1921, 41 Stat., 1249). By section 3, these mineral deposits were

reserved to the tribe and mining privileges were to be leased by the tribe through its council, with the approval of the Secretary of the Interior, under rules and regulations prescribed by him, and at "royalties" to be paid to the tribe at rates to be determined by the President of the United States.

The Osage Indians are, therefore, interested in two classes of property: (*a*) The land, divided into 2229 parts, each part belonging to a member and held in severalty; (*b*) the mineral contents still reserved and held by the tribe as common property.

The Indians also had funds in the United States Treasury. Section 4 provided as to what should be done with these funds and certain other prospective sources of income. All said funds "and all moneys due and all moneys that may become due or may hereafter be found to be due" were to be held in trust for 25 years from January 1, 1907. These funds were to be segregated and placed to the credit of each shareholder, said credit to draw interest. This interest was to be paid quarterly to each shareholder—

> except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of 21 years; *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians as above provided.

All royalties received from oil, gas, or other mineral leases and all money received from the sale of town lots and of three certain reservations, as well as all money received from grazing lands, were to be placed in the Treasury to the credit of the shareholders for distribution to each "in the manner and at the same time" that the aforesaid payments of interest were to be made, i. e., quarterly.

Section 5 provided that at the expiration of 25 years the lands, mineral interest, and moneys should become the absolute property of the shareholders or their heirs and that deeds should issue and the principal fund distributed.

Section 6 provided that the lands, moneys, and mineral interests of the shareholder should descend to the legal heirs according to the laws of Oklahoma except where the shareholder leaves no issue, or husband, or wife; in which event the land, moneys and mineral interests go to the mother and father equally.

Section 7 directed that the lands set aside and severally allotted should be for the use and benefit of the individual allottee with a right to lease the same for farming or other purposes; but "that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority."

Section 12 provided that "all things necessary to carry into effect the provisions of this act not otherwise specifically provided for shall be done under

the authority and direction of the Secretary of the Interior."

When this act was passed the right to explore, drill and produce oil in the Osage lands was vested in the "Foster lessees" under a contract made by the tribe and Edwin B. Foster in 1896. The term of this lease expired in 1906, but it was renewed for another period of 10 years by act of March 3, 1905 (33 Stat., 1061). Royalties on production from such lands as were covered by the Foster leases were then in existence.

When the Foster leases expired in 1916 a new scheme went into operation. The privilege of obtaining oil and gas leases on tracts of land was auctioned off to the highest bidder, i. e., to the party bidding the highest sum of money to become the lessee of a particular tract. This sum of money is called the "bonus." The bonus system was known in the oil world prior to 1906 but was not in existence in the Osage country at the time of the passage of the act of June 28, 1906. So, while the act of 1906 makes specific provision for the division and distribution of royalties, the statute is silent as to bonus money for the very excellent reason that it was then neither in existence nor in contemplation. Yet it is a very substantial part now of the Osage income. More than $50,000,000 have accrued from this source since 1916.

Royalties have materially increased since 1906. The record (p. 9) shows that the *per capita* income of

the Osages from all sources was $168 in 1904, $343 in 1905, $256 in 1906, $388 in 1907, and $272 in 1908. The interest on the principal fund, which the act of 1906 directed should be divided and distributed, has amounted to $191 per annum. This indicates as the income of the six Osage shareholders that make up the Mosier family a total income of $1,008 in 1904, $2,058 in 1905, and $1,536 in 1906, the year when the act was passed. But in the year ending June 30, 1919 (Record, pp. 9 and 10), the income *from royalty alone* had advanced to $2,105 per capita per annum. This, with the interest, made $2,296 *per capita*. In the year ending June 30, 1920, the amount of royalty had increased to $3,360, presenting, with the interest, an income of $3,551. per capita.

Now, in the same year there was collected $4,730 for each shareholder from bonus money. At the time when this case was under consideration by the court below the total income of the Mosier family, if bonus be distributable as royalty, amounted to $49,686 in contrast with the $1,536 they were receiving at the date of the passage of the act.

The record shows, and it is not disputed, that the Osages with signal exceptions are indolent, extravagant, careless, and improvident. They have not been obliged to work or to earn their support. Despite their most unusual income, they have become involved in financial difficulties. They have spent all that they have received and have incurred indebtedness in sums that are startling and inexplicable. It is conceded that Mr. and Mrs. Mosier are not im-

provident squanderers, so far as we know. They represent an exception to the rule; but this is a test case, and what is decided here affects not them alone but the others.

This action grows out of two efforts of the Secretary of the Interior to save waste and to inculcate thrift. When the total per capita income was small, there was little chance for squandering, but after 1916, when the oil property was opened up to far greater exploitation than it ever knew under the Foster leases, a very difficult situation was presented. As to the adults, the Secretary had no choice under the act. He was directed to pay to each individual quarterly his share of the interest money and of the royalties. He could squander it as he pleased. The Secretary was also directed to pay over to the parents of minor shareholders their shares. As the attitude of parents in respect to minors' moneys was that the same in substance became their property upon payment, to be spent by them as they pleased in their own business affairs and in the support of the family in general as well as in the care and education of the minor children themselves (Record, p. 20), the Secretary, by order of April 30, 1917 (Record, p. 5, 10), directed that the parents of minor shareholders should make a statement showing what use had been made of the child's money received by them at the previous quarterly payment; and this with a view of finding facts on which it might be determined whether there had been any misuse or

in the Treasury as principal to yield an interest income (23 Decisions, Comp. Treas. 483, 486). The Comptroller thought that bonus should be classed with royalty. The Secretary, however, could not agree that bonus is royalty. Under the Comptroller's decision, he could not deposit the money in the United States Treasury. The best he could do was to divide and distribute it among the shareholders. This was simple so far as competent adults were concerned or where he could pay to legal guardians; but a difficulty immediately arose as to the minor's share. He had no authority to pay a minor's share to his parent as natural guardian unless bonus is the same thing as royalty.

Construing the act which it was his duty to administer and being unable to convince himself that bonus is royalty, he directed that parents who desired to receive the minor's share of bonus should take out special letters of guardianship so that he could pay to them in a capacity whereby they would be accountable under the law to a court. This worked very well until January 28, 1919, when the Supreme Court of Oklahoma in *Williams* v. *Hewitt* (181 Pac., 286), decided that there was no authority of law for the appointment of a parent as guardian of an Osage minor child where a parent was living unless under conditions specified in the act of April 18, 1912 (37 Stat., 86), viz, where the estate of the minor was being wasted or misused by the parents. Mosier took out letters of guardianship over his four children and as such received all their bonus money down to

and including the October, 1918, payment (Record, p. 12). The next bonus payment was in April, 1919 (Record, p. 12). At the time of the institution of the suit, Mr. Mosier could not receive this money as guardian under the decision in *Williams* v. *Hewitt;* nor could he receive it as natural guardian unless the term royalty in the statute comprehends bonus money; and that is one of the questions involved in this litigation.

THE QUESTIONS INVOLVED.

There are two main questions of law which this record presents:

(1) Is money derived from the sale of oil and gas mining rights in the Osage lands, known as "bonus" money, comprehended in the term "royalty" as used in the act of June 28, 1906 (34 Stat., 544), and is it to be treated and distributed as such?

(2) Is the minor child's income from trust funds and his distributable share of tribal income payable by the terms of said act to the parents during minority, the child's money or the parent's money, to be accounted for by the parent or not to be accounted for?

Incidental to the latter is a question of the Secretary's power to make regulations requiring an accounting.

The trial court resolved the first question in favor of relators' contentions, holding that "bonus" money is comprehended in the term "royalty" as used in the act and that it must be treated and distributed as

such. The two Associate Justices of the Court of Appeals adopted this view. The Chief Justice, however, holds that there is a wide difference between royalty and bonus and that there is no statutory direction to the Secretary to pay the child's share of the bonus to the parents.

The trial justice also determined the second question in favor of relators, holding that the parents of minors should have the use of the minors' money. He ruled that the money might be used in the upkeep of the family but that it must not be squandered. He further held that, in order for the Commissioner to inform himself as to whether the limitations of the proviso relating to payment of minors' moneys are observed by parents "*as its boundaries have been marked out herein*," it is not an unreasonable exaction to require parents to furnish him periodically with full statements of the expenditure by them of the moneys of their minor children; notwithstanding which, however, he entered up a judgment allowing the writ of mandamus to compel the Secretary to make to relators the quarterly payment due in June, 1919, without having received any such statement or showing from the relators as to their stewardship of the funds received by them on March 19, 1919. The relators may have conserved the March, 1919, payment; on the other hand, they may have gone back to their former practice of using it for their own purposes. The trial court makes no distinction between "misuse" and "squander." Two Justices of the Court of Appeals, by adopting his opinion, adopt

his view. The Chief Justice, in his dissenting opinion, recognizes the distinction between "misuse" and "squander," holding that if a minor's money is used for the benefit of anyone other than the minor it is misused.

ASSIGNMENT OF ERRORS.

The text of our assignment of errors is found on pages 35, 36 of the Record. They may be restated in three propositions:

1. That the court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the act of June 28, 1906, a statute which it was his duty to administer, and to require the substitution of the court's construction for his own.

2. That the court erred in holding that bonus money is royalty within the meaning of said act.

3. That the court erred in holding that the money or income from the share of Osage minor children payable under said act to the parent during the minority of the child is in effect the money or property of the parent, to be used by the parent as his own in the up-keep of the family or in his own business; and in failing to hold that said money is the minor's money, any use thereof for the benefit of others being a misuse of the money within the meaning of the proviso to section 4 of said act.

ARGUMENT.

I.

The court erred in taking jurisdiction to review the Secretary in his construction of the act of June 28, 1906, a statute which it was his duty to administer, and through the writ of mandamus to require the substitution of the court's construction for his own.

A material change in the situation developed when the Osage shareholders' incomes became large as compared with the income existing in 1906 and when, through the expiration of the Foster leases, the entire oil-bearing territory was re-leased under a new system which created what we call the bonus money. The Secretary sought the language of the statute for guidance in the discharge of his duty. He could not find the word "bonus" or any other language that placed such funds in the category of those which he was bound periodically to disburse. He could not agree with the Comptroller's view. The authority of a text writer, Mr. Archer, later to be quoted, was more persuasive in his judgment. He was unable by construction to conclude that bonus is the same thing as royalty.

Being advised that parents were spending the entire large incomes of their minor children exactly as if it were their own, he also considered the language of the statute with the view of ascertaining if anything therein authorized him to stop this spoliation of what he deemed to be the minor's property. In his judgment there was justifying language. He saw a difference between *misuse* and *squander* and he

found that the statute employed both terms in describing a condition that would warrant the Commissioner in withholding further payments to parents of minors. He found in section 12 of the act authority to do all things necessary to carry into effect the provisions of the act. He thereupon made these regulations hateful to the relators and to those who had been wont to regard their child's money as their own. There was no plain direction to mark the way of clear ministerial duty. It was only through construction of the statute which it was his duty to administer that he could ascertain the lines of his duty. This involved discretion. Involving discretion we submit on the authority of this court's decision in *United States ex rel. Alaska Smokeless Coal Co.* v. *Lane* (250 U. S., 549, 555), that the Secretary's action is impregnable to mandamus even though his conclusion on the points of law involved may be disputable.

That his construction is not arbitrary, we think the argument which follows will develop. At least we shall submit the case with confidence that the relators' contentions are not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to them. If this be so, the relators are not entitled to a writ of mandamus such as the court below awarded. *United States ex rel. Hall* v. *Payne* (254 U. S., 343, 348). The decision of the majority of the Court of Appeals is a plain instance of a court's putting itself in the place of the Secretary, passing upon the same propositions, and

arriving at conclusions differing from his; and then through its extraordinary process, the writ of mandamus, compelling the Secretary to retract his decision and to give effect to another not his own and not having his approval. Was it the right of the courts below thus to review the Secretary? As this court said in *United States ex rel. Ness* v. *Fisher* (223 U. S., 683): "The question is not new, but has been often considered by this court and uniformly answered in the negative."

II.

"Bonus" money is not "royalty" within the meaning of the act.

Congress directed particularly the character of funds that must be disbursed every three months, as they accumulated, to the Osage shareholders. The statute announced five sources of individual income so to be distributed:

1. Interest on funds held in trust.
2. Royalties on mineral leases.
3. Money from town lot sales.
4. Money from sale of reservations.
5. Money from grazing.

It is on our contention that the Secretary need not disburse a single penny unless he can identify it with some one of the class of funds or sources of income just enumerated. There is no legislative direction to pay out "bonus" unless it is to be identified with "royalty." It manifestly can not be interest on funds, or money from sales of town lots or reservations, or money from grazing.

At the outset of the opinion of the court below, the court shows a signal lack of comprehension of the source of bonus money. It is spoken of as "money derived from the successful bidder for an oil lease of land *belonging to the minor children of the relators*" (Record, p. 28). Later they refer to the provision in section 7 that parents shall have the use and control of minors' lands "together with the *proceeds* of the same." On this foundation, they build the argument that "bonus" money is one of the proceeds of the minors' land. Royalty is also such a proceed. The thought seems to be that as both are proceeds both must be paid. This might be true if Congress had directed the quarterly payment of the *proceeds* from oil and gas mining leases; but Congress did not. It spoke of one of the proceeds only, viz, royalty. We can not follow the line of reasoning that leads to the conclusion that bonus must be royalty.

In the first place, this money is not derived from the sale of an oil lease *on land belonging to the minor children*. There may not be a drop of oil in the land allotted to them; and each shareholder, by the way, received an allotment under the act of something like 657 acres of land. The allotted land is the individual's own. The mineral deposits, however, bear no relation to the individual allotments. As already noted the oil and gas contents, regardless of their situs, whether under the surface of land allotted to this or that shareholder, were reserved to the tribe *in common*; and "bonus" as well as "royalty" is

proceeds from the common property; not from any individual holding allotment.

Congress commanded the Secretary to pay out royalty. Royalty had a well-defined meaning in 1906 and it has today. It embraces just one peculiar source of revenue from mining leases. It comprehends, as such, no more. Under the act, the Secretary has laid on him unquestionably a ministerial duty of paying out royalty—a duty which mandamus may enforce if not voluntarily performed. But that writ is not designed to enforce an undefined duty or even a questionable duty. It is not a proceeding to ascertain and define or create the right or a duty, but to enforce the performance of an existing clear ministerial duty (26 Cyc. 165). It is not competent, we submit, for a court to change the language of an act of Congress in order to discover a duty not otherwise clear. In this case the court below read into the act a broad term, "proceeds," which is not there, and erased the technical term "royalty," which is there. Royalty, of course, is one of the proceeds but only one of the proceeds of an oil lease. There is "rent for nondevelopment." Proceeds may include all these items but royalty is only an item. And, strictly speaking, bonus is not a proceed of a lease; on the contrary, the lease proceeds from the payment of bonus.

To understand the nature of the two, we must resort to the history of oil and gas mining. There are no court decisions distinguishing bonus and royalty.

Oil and gas are fugacious in nature. They are mobile minerals as distinguished from the solid minerals found in placer deposits or in rock in place. The latter are fixed *in situ*. The owner of the surface has title to the mineral content. The minerals are in his possession as a part of the *corpus* of his real estate. Oil and gas, however, while underlying the surface of his property, may escape from his land. So property in oil has been assimilated to property in animals *ferae naturae*—as merely a right to reduce to possession. The proprietor of the surface may bore into the earth to obtain oil or gas. No one else, without his permission, may do that. If he finds oil and reduces it to possession, the oil is his to remove and to sell. The exclusive right to bore, seek, and secure the oil and gas underlying his own land is one property right. But ownership in the subjacent oil is not his until his effort has resulted in dominion and control by actual possession. *Ohio Oil Co.* v. *Indiana* (177 U. S., 190, 208). That is another property right. The two things are essentially separate. (*Id.*, p. 202.)

But the owner may not do the drilling. Although he is full lord over his estate, with the exclusive right to drill, he may not desire to drill and secure title to the oil. He may, if he will, grant a part of his sovereignty to another party. He may invest an oil man with his right to drill and reduce the oil to possession. He may grant so much of his lordship as will enable the oil man to stand in his shoes in the matter of exploration and reduction of the oil to

possession. This is commonly done by what is called a "lease." Some say that it is not, strictly speaking, a lease but that it is in the nature of a grant of an incorporeal hereditament. It is immaterial so far as the case at bar is concerned.

The Osage Nation, as the owner of the oil and gas contents, divides the surface of land where these deposits are suspected to exist, and offers for sale to the highest bidder the right to drill, discover, and produce oil and gas on a certain tract. Several tracts are offered at public auction from time to time. The highest bidder on a given tract obtains there and then the right to have a lease executed to him. The consideration which he pays for this is called "bonus." He pays it whether or not oil or gas exists. He has to pay it before he has a right to drill, explore, and extract. He must pay it whether he finds a million barrels or a single drop. *It is the consideration for the grant of a partial estate in the land.* It is not the price for the oil he may take. When he pays it, or secures it, he is given the lease. Under the lease, when he exercises his right to drill and has found oil or gas, he becomes the owner thereof; but the lease provides in that event for another consideration; i. e., he must yield to the lessor, the Osage Nation, a certain percentage of the oil which he extracts and produces. *This is the royalty.* Section 3 of the act of 1906 provides:

> That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States.

The President has fixed the royalties at one-sixth or, in certain contingencies, one-fifth (Record, p. 12). The act does not speak of different kinds of royalties. In one place it says that the President is to fix the rate of royalties and elsewhere it identifies these royalties and says that the Secretary is to pay them out on a *per capita* basis at the time he distributes interest on the tribal trust funds. The court below says (Record, p. 29) that bonus "may not be royalty in the strict sense of the word but it is certainly money derived from 'oil * * * leases upon the lands' to quote the language of the statute." What of it? The statute does not direct the Secretary to pay out "money" received from oil leases upon the land. It directs him to pay out *royalty* received from oil leases upon the land. Besides bonus is not money derived from oil leases. The lease, or the right to lease, is derived from the payment of bonus money. Royalty is a proportion of the oil itself although it may be settled for by conversion into money. The distinction is observed by Mr. Archer in his work on "Oil and Gas" where on page 44 he says:

> The consideration which the lessee pays for the lease must not be confounded with the consideration which the lessor is to receive for the oil and gas. The cash consideration, *bonus*, or whatever it may be called, paid or agreed to be paid by lessee for the lease, is a consideration for the exclusive privilege of entry for exploration. The rental or commutation money is the consideration which

> the lessor receives for permitting the lessee to further hold his exclusive right of entry for exploration. These payments, by whatever name they may be called, do not vest any title in or right to the oil or gas in place. As long as no developments are made resulting in the discovery of oil or gas by lessee, his lease remains a mere privilege to enter and search. When lessee discovers oil or gas in paying quantities, his right to produce then becomes a vested right. He is then, and for the first time, authorized and obligated to pay the consideration to lessor for the exclusive vested right to produce the oil and gas, the true consideration for such minerals being the *royalty* of oils, and cash rental for gas, as the case may be.

In *Brookshire Oil Co.* v. *Casmalia Oil Co.* (103 Pac. 927), the court speaking of the effect of a lease said "the title is inchoate and for the purpose of exploration only until oil is found. If oil is found, then the right to produce becomes a vested right." On the other hand in *Venture Oil Co.* v. *Fretts Oil Co.* (102 Pac. 451), the court said that the right to explore is not an inchoate right but a vested right and that what is inchoate is the right to produce oil and gas unless and until the oil and gas is produced. It is immaterial whether the right to explore is an inchoate right or a vested right. So far as these cases are useful in this one, the real point is that the right to explore is in an estate which is the subject of a grant distinct from the oil and gas deposits themselves and that it may be granted for a distinct consideration

that does not depend in the slightest manner upon the existence of oil or gas, or upon title to oil or gas, except in so far as the amount of the bonus consideration offered reflects the judgment or the hopes of the bidder.

As already noted, the Osage oil lands were under lease on a royalty basis at the time of the passage of the act of 1906. There was no such thing as bonus in the Osage country at that time. There was no occasion for Congress to legislate concerning bonus. Royalty on production was in existence and Congress did legislate with reference to that. If we are bound to look to the act for some expression that will comprehend the then unknown bonus, there is much room for the contention that bonus comes within the category of "moneys that may become due" mentioned in section 4 of the act. This was the view originally taken by the Secretary of the Interior; but on February 23, 1917, the Comptroller of the Treasury ruled (23 Comp. Dec., 483) that the shares of the minor Osage Indians, whose parents are living, in bonus moneys received from the sale of oil leases should be classed with royalties to be paid out and that they could not be deposited in the Treasury so as to bear interest.

This decision was effective enough to prevent the Secretary from adding these bonus moneys to the Osage principal fund because the Comptroller's decision on the point was final; but neither his reasons nor his conclusion were controlling on the Secretary as

fixing the latter's duty to pay the money out. Yet it left the Secretary with Hobson's choice. It might well be argued that the Secretary's conception of the nature of bonus should require him to treat it as principal and then to withhold payment of bonus even to an adult. But, in the dilemma wherein he was placed by the Comptroller, he undoubtedly felt justified in making the distribution because the money went where it must ultimately go and the adults or the legal guardians of other shareholders could discharge him of liability. Ultimately it was theirs and their receipt of it, even if premature, barred them from complaint. Not so, however, where, contrary to the usual rule, a parent as natural guardian is demanding money belonging to a minor child who has no legal guardian.

The Secretary can not pay to a natural guardian except when thereunto specifically authorized by Congress, in strict accordance with the terms of such authorization.

On our theory, the oil and gas being reserved as a tribal estate, the bonus represents a cash consideration for the granting of a partial estate in the oil and gas bearing lands to someone else. Bonus is paid once and for all as the supposed equivalent in cash for the estate that is granted. It is not income to any extent other than the purchase price realized from the sale of real estate is income. Bonus is fixed by the bidder. Royalty is continuous as long as oil is found. It fluctuates with production and with the

price of oil and it is appropriately payable to the shareholders at recurring intervals. Moreover, it is fixed by the President under section 3 of the act.

And, after all, are we bound to find that "bonus" falls within some classification foreseen by Congress and covered by the act? It is certain that in point of fact "bonus" was not thought of in the 1906 legislation either as a present fact or a future possibility. Coming unexpectedly into existence, and not being specifically provided for in the act, it may well be contended that *ex necessitate* it is one of those things to be disposed of "under the authority and direction of the Secretary of the Interior." If, however, "bonus" is "money that may become due" and is to be treated as a retained principal and should not be disbursed even to an adult, it was wrong for the trial court to award the writ. By an unhappy failure to retain the adults' share, the Secretary could not create the duty of paying the child's share to the parent. Two wrongs do not make a right.

Finally, we point to the act of March 3, 1921 (41 Stat., 1249), as a legislative recognition that bonus is not royalty and that its disbursement must be provided for independently of any provision regarding royalty; for section 4 of that act provides for payment, in the future, of "bonus received from the sale of leases" as well as for "royalties received."

III.

The minor's share of money distributable under the act of 1906 is the minor's money and is not the property of the parent.

In discussing the Indian appropriation bill for 1919, Mr. Tinker, an Osage Indian, was a witness before the United States subcommittee. He claimed that the minors' share of the income belonged to the parent. The chairman of the subcommittee said:

> In other words, you want the door wide open, so that the parent, whether a spendthrift or not, may squander this golden stream and turn the child loose when he is 21 years old. Do you want a situation like that?
>
> Mr. TINKER. If you put the law in that way, all right.
>
> The CHAIRMAN. Nowhere for a thousand years, where civilization has obtained, has anybody, parent or not parent, been permitted to spend the money of an infant without rendering an account to some court.
>
> Mr. TINKER. But we insist this is not the money of the infant; it is the money of the parent; it belongs to the parent.
>
> The CHAIRMAN. If it belongs to the parent, I have no more to say.

That is the situation here. If it belongs to the parent, we have no more to say. The courts below were right if the money due on account of a minor becomes the parent's money upon payment.

The practice which the relator seeks to justify by this suit is the use by the parents of the minors'

shares of income paid to them under the statute as their own—in their personal business affairs and in the support of the family in general—and not exclusively to be used for the care and education of the minor; any unexpended balance above what is necessary for the individual child as the property of that child, to be accounted for by them upon the attainment of the minor's majority.

The court below sustains the practice which the Secretary condemns. On page 23 of the record, the court says that the Secretary insists such money can be used only for the benefit of the minor exclusively and if not so used that it would be a misuse or squandering of the funds. The court then says:

> In the opinion of the court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money, as they are to have the use of the minors' land and the proceeds of the same. A use, no doubt, that shall be wise and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens. * * *
>
> The statute makes the parents, not the Commissioner or the respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant.

The Secretary's view of the meaning of the statute is that the Commissioner is to pay the money to parents as natural guardians under the same conditions, liabilities, and limitations that it would be paid to legal guardians. It is his position that the parent must use the money for the benefit of the child exclusively and without squandering it. If there be a surplus after the reasonable needs of proper support and education are met, that surplus must be conserved for an accounting at the end of his stewardship, precisely as if he were a legal guardian. Any use of the money for the benefit of anybody but the minor child, the Secretary contends, is a *misuse* of that money which, just as much as squandering, justifies the Commissioner in withholding further payments.

When the communal holdings of the tribe were broken up and individualized, there was no distinction drawn between young or old, minors or adults. Each enrolled member became a shareholder to the extent of a 2299th part of the principal and distributable funds. Each share was without qualification the property of the shareholder. The money in the Treasury was to be placed to the credit of the individual members "on the basis of a *per capita* division among the members of said tribe, as shown by the authorized roll of membership." Section 6 of the act provided for the descent of lands, moneys, and mineral interests of any deceased member. No distinction that goes to the nature of a property right was made between minor child or his parent. It is

true that by section 7, in speaking of the minor's individual allotment of land, it is provided:

> That parents of minor members of the tribe shall have the control and use of said minor's lands together with the proceeds of the same until said minors arrive at their majority.

The ownership of the land does not change but here is authority for the parent's use of the *land and its proceeds.* It presents the kind of language Congress uses when it means to enact the idea that the relators and the court below entertain upon the question now before this court. But Congress used no such language in providing for the distribution of a minor's interest money and royalty money. The first paragraph of section 7 of the act provides:

> And the interest that may accrue thereon (i. e., the trust funds) shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest *shall be paid* quarterly *to the parents* until said minor arrives at the age of twenty-one years: *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

The next paragraph provides for the payment of royalty, etc., in the manner and at the same time that the interest money is paid. There is no language

here that authorizes the parent to *use* the minor's money as there is in section 7 which deals only with such proceeds as may come from the minor's 657 acres of allotted land, i. e., the receipts from crops or the rent it may produce. Section 4 simply provides authority for payment to the parents as *natural guardians* where, were it not for this provision, the Secretary would be obliged to require the taking out of letters of guardianship before he could disburse any portion of the income of a minor. But there is no transmutative magic in these words "shall be paid," for we find them in the second proviso, namely, that the interest of minors whose parents are deceased "shall be paid to their legal guardians."

If Congress meant that the parents should have the use and benefit of the minor's money to improve the standard of their lives and to produce home environment as well as for educating and maintaining the children, did Congress also mean that the legal guardian should use the funds for the upkeep of his family on an increasing scale of comfort as the increasing income might justly warrant, and for producing "home environment"? Yet, if the language "shall be paid" to the parents means all this, why should not the language "shall be paid to their legal guardians" mean the same? And why, if it be possible that the parents receive this money to all intents and purposes exactly as they receive their own individual shares, should Congress be at all concerned whether the money thus paid was misused or squandered, when, as to the parents' individual

shares, the act made no provision in that regard? Yet, section 4 distinctly says that if the Commissioner become satisfied that the interest of any minor is being misused or squandered, he may withhold the payment of such interest. Congress called it the *interest of the minor* even after it was paid to the parent. It had not become in the legislative mind the property or interest of the parent.

The trouble with the courts below is that they failed to observe a distinction in definition between the words "misused" and "squandered."

The court will observe that Congress used two words—"misused," "squandered." These words are not identical. The Standard Dictionary defines "misuse" as "to use or apply wrongly or improperly." "Misusage" means "erroneous or improper use; misapplication." Squander has quite a different meaning: "To spend wastefully or with foolish lavishment; waste profusely; dissipate"; "To waste money or some other valuable thing; spend fortune or substance lavishly and foolishly." The synonyms are: "Dissipate, expend lavish, scatter, spend, throw away, waste"; and the antonyms are: "Economy, hoard, hold, husband, lay by, lay up, preserve, reserve, save."

The relators receiving a minor child's money may use it lavishly on him personally, indulge him with unnecessary luxuries, waste it in foolish extravagances, or invest it in some reckless wildcat scheme. The terms "squander" comprehends just such uses. The result is that every penny is dissipated.

On the other hand Mr. Mosier might not do these things—and as a matter of fact he does not, so far as we know. But he may take the money just as if it were his own and put it into his business or expend every cent of it for the support of his family in general with merely a benefit to the particular minor that would be incidental to such a use of the money; and that was what he did prior to 1917. Now, the difference between the lower court's view and the Secretary's thought is that the court says if he squanders the money in the general manner outlined, the Commissioner may withhold payments; while the Secretary holds that if he does not squander it, but so uses the money in the way last indicated, i. e., for himself and for his family in general, even if it does result in an increasing scale of comfort, promoting a better home environment, he is guilty of a *misuse* of the money that likewise justifies the Commissioner in withholding further payments. The loss to the child through the dissipation of his estate is exactly the same in the one as in the other instance.

The argument below that undertook a justification of the court's view was that at the time of the passage of the act of 1906 payments of a minor child's annuity or income to the parent were treated by the parent precisely as a payment of his own share. In other words it was then something like this: A father receives so much on his account and so much on his wife's account and, in addition, the same per capita allowance for each one of the minor children dependent upon him. The trouble with this argument is

that it is founded on casual facts rather than principle. The small per capita income then rather eliminated the chance of misuse or squandering because every penny was needed for a reasonable support. There is a wide difference between a family income of $1,500 and $50,000. Moreover, the Osages were not then enrolled as individual shareholders. After 1906, the child was just as much a shareholder as his parent was. Before 1906 what was paid to the parent might be regarded as an allowance on account of the child. But after 1906, the amount paid was on account of one equally with the parent a shareholder in the fund.

There is certainly no verbal support in the statute for the proposition that the parents are to determine what is a judicious use of this money. The law makes the Commissioner the judge. It is for him to become satisfied whether the interest of the minor is being misused or squandered. To enable him to act intelligently the regulations which are questioned by the relator were made. The courts below uphold the Secretary's authority to exact an accounting. Yet the judgment of the court requires the Commissioner to disregard every element that enters into our conception of the meaning of the word "misused." We submit that the Chief Justice of the Court of Appeals is wholly correct when he says:

> Misused means not used for the proper purpose. It is the minor's money that is paid to the parents and if used for the benefit of anyone else it is misused.

We submit that the language of the act of April 18, 1912 (37 Stat., 86), sustains this view in providing in section 3 that no guardian shall be appointed for a minor whose parents are living "unless the estate of said minor is being wasted or misused by such parents." That act evidently regards the money as the property of the child. Furthermore, the act of March 3, 1921 (41 Stat., 1249), amounts to a legislative confirmation of the Secretary's position by providing in section 4 for the payment of but $500 quarterly out of the income of an Osage minor for his maintenance and education, the payment to be made "to the parents or natural guardians or legal guardians actually having minor members under 21 years of age personally in charge."

CONCLUSION.

We think we have shown that the difference between "royalty" and "bonus" is so fundamental that the latter can not be regarded as comprehended by the former. At least we have shown—and the argumentative quality of the decision of the lower court also shows—that the relators' construction of the act is not so plainly obvious and certainly right that there is no room for the construction advanced by the Secretary. This affords reason enough for withholding the writ of mandamus in so far as the bonus money is involved; but our case is stronger than that: For the court took a proceeding for mandamus as an opportunity to construe the act itself exactly as if it were a reviewing tribunal with man-

damus as the proper process for review of the Secretary; and this for the purpose of finding in the act a duty not otherwise plainly apparent. The court directs the Secretary to perform this duty thus discovered and defined even if he must disregard his own construction of the act.

So in regard to the minor's money: The Secretary must abandon his thought that Congress meant some thing when it used the word "misused." He may call for statements from the parents, say the courts below, but if these statements show the expenditure of every penny in the parent's business or in support of the family in general, he must sit still, watch the process, and continue to pay out until he catches the parent in some act of squandering according to the court's idea, such as engaging "in hazardous or speculative undertakings or in lavish and extravagant expenditure" (Record, p. 23); and even then, we suppose, the question will arise as to whether the lavish and extravagant expenditures were not properly used in producing home environment tending to make better and more contented citizens. With the increasing income there is to be "an increasing scale of comfort." Who is to draw the line, and where? The court says the parents in the first instance are the judges; in the last instance, it may be a court; never, apparently, the Commissioner or the Secretary, because mandamus may be resorted to then to measure the "scale of comfort" and to determine whether suspected lavishment and extravagance were not after all necessary

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 205.

ALBERT B. FALL, SECRETARY OF THE INTERIOR,
Appellant,

vs.

UNITED STATES EX REL. W. T. MOSIER ET AL.,
Appellees.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT.

As stated by counsel for appellant in their brief, this is an action to compel the appellant, by mandamus, to pay to William T. Mosier and Louisa Mosier, his wife, all moneys derived as interest on a certain trust fund belonging to their minor children and all moneys re-

ceived from the shares of said minors as royalties and income from oil, gas, and other minerals belonging to the Osage Tribe of Indians, of which tribe the said William T. Mosier and Louisa Mosier and their minor children are members. The trust fund originally belonging to said Osage Tribe of Indians was, under and by virtue of the act of Congress of June 28, 1906 (34 Statute, 544), distributed among the members of said tribe so that each has been allotted his or her pro rata part. Said moneys so distributed were placed in the Treasury of the United States to the credit of each individual member, said fund to bear interest in favor of each member at the rate of five per cent per annum.

The mineral interests of said Osage Tribe of Indians were not divided, but under said act of Congress were to be held in trust by the United States for the benefit of said Indians for a period of twenty-five years from and after April 8, 1906. Authority was given under said act of Congress to lease said mineral interests at a rate of royalty to be fixed by the President, the proceeds therefrom to be distributed to the members of the tribe pro rata, so that each would receive his or her pro rata part. A distinction was made between adults and minors in the matter of the payment out of their part of the interest money and their part of the proceeds received from the sale of minerals and other properties mentioned. In the case of the adult the income, both interest and royalty, was to be paid direct to the adult. In the case of minors these moneys were to be paid to the parents of the minors until said minors reached the age of twenty-one years, unless the Commissioner of Indian Affairs should become satisfied that such parent was misusing or squandering said money, in which event the Secre-

tary of the Interior was authorized to withhold the payment of the same to the parent.

For a long time prior to the allotment of the lands and moneys of the Osage Tribe of Indians, under the act of Congress of June 28, 1906, above mentioned, the income of the tribe derived from their mineral rights, from their grazing lands, and the interest on their trust fund, was distributed pro rata among the members of the tribe, except in the case of minors, in which case the money was paid to the parents of said minors, except in cases where the parents were misusing or squandering it, in which case it was frequently withheld until such time as the Commissioner of Indian Affairs became satisfied that the parents were not wasting the money in drinking, or idleness, or gambling, but were trying to put it to some good use. That this was the custom of the handling of the affairs of the Osage Tribe of Indians for many years prior to the passage of said allotment act, is not disputed. (Record, p. 9.) Congress in the passage of the Osage allotment act but gave expression in a legislative way to a custom that had long prevailed in the Interior Department in the matter of the handling of the affairs of the Osage Tribe with reference to the matters under consideration. For a period of eleven years from and after the passage of the said allotment act, the Secretary of the Interior, and those acting in authority under him and having to do with the matter of the handling of Osage affairs, construed this act to mean that the moneys derived as interest on the trust fund, royalty on oil and gas, and the so-called "bonus money," was, in the case of minors, to be paid to their parents, unless the Commissioner of Indian Affairs became satisfied that the parents were misusing or

squandering the same, in which event it might be withheld; and that in the payment of the said moneys to the parents the parent was to determine how the same were to be used, and the only matter in which he could be held accountable for the use of the same was the question as to whether he was misusing or squandering it; and not until June, 1917, did the Secretary of the Interior question the right of the parent in handling this money, to do as he pleased with it, so long as it was not misused or squandered, permitting him to handle it in his own way, as his own money. (Record, p. 10.)

In 1917, however, when the fund became larger, a new policy was promulgated by the Secretary of the Interior with reference to the handling of these funds coming from the children's shares. In this new policy it was decided that the parent must show that this fund was being used exclusively for the benefit of the particular minor and was not being handled by the parent as he saw fit, and that unless the parent did show that the fund was being used exclusively for the benefit of the minor, it would be construed a misuse, which would warrant the Secretary of the Interior in withholding the same from the parent. Thus, all the former holdings of the Secretary of the Interior with reference to this fund were set aside and this new policy adopted. (Record, p. 10.)

It is the claim of the appellees that this position on the part of the appellant is unauthorized and is not warranted by law, and, as it deprives the parents in this case from the moneys they are entitled to under said act, the courts will compel the Secretary to pay out said moneys in accordance with said law.

In addition to the proposition as to whether or not

the Secretary may be compelled to pay out said moneys, there is another question involved, which in a way comes under said general proposition and yet which requires a separate consideration, and that is that the so-called "bonus money" is comprehended in the term "royalty" as used in said act of Congress with reference to oil, gas and other mineral leases. This will be treated more extensively later.

The appellant has refused and continues to refuse, ever since June, 1917, to pay to William T. Mosier and Louisa Mosier, *as parents of the minors involved in this case,* any of the moneys derived as interest on the trust fund or as royalty and bonus from the mineral rights of said Osage Tribe of Indians. It is true that a part of the so-called "bonus money" that was derived from the sale of oil and gas leases up to January 1, 1919, was paid to William T. Mosier, as *special guardian* of said funds of said minor children, under appointment by the county court of Osage County, Oklahoma, and the taking out of letters of guardianship was required of said William T. Mosier by the Secretary of the Interior, before said bonus money would be paid to him as such guardian. The Secretary of the Interior had declined and refused to pay over said bonus money to said William T. Mosier *as the parent of said children,* and has ever since done so, and is doing so now.

From and after June, 1917, the money coming as interest on the trust fund and as royalty from the mining of oil and gas belonging to the Osage Tribe of Indians, was refused and denied by the Secretary of the Interior to the said William T. Mosier as the parent of said children, except upon the condition that he receive it as the money of said minor children, and

expend it as the money of said minor children, and not expend or use any part of the same for his own benefit, or for the benefit of the mother of said minor children, or for the education and care of the family in general, or in his private business. *It is not true that any moneys have been paid to William T. Mosier and Louisa Mosier since June, 1917, coming from the tribal interests of said minors, except upon the condition that said Mosier receive said money as the children's money and accounted for accordingly.* This we claim is contrary to the purpose, intent and spirit of the law, and without lawful authority.

As to the bonus money, there is no dispute as to the absolute refusal of the Secretary of the Interior to pay the same to William T. Mosier and Louisa Mosier. (Record, p. 12.) As to the royalty and interest money, there is no dispute of the fact that the Secretary refuses to pay the same to William T. Mosier and Louisa Mosier, except upon the condition that they receive it as the money of the children, without any right on their part to use said money as they saw fit so long as they did not misuse it or squander it in the handling of their own affairs. (Record, p. 11.)

Said act of Congress of June 28, 1906, in providing for the leasing of said Osage mineral interests, provided that the rate of royalty should be fixed by the President. In fixing the royalty upon oil and gas the President determined the same as one-sixth of the oil and gas produced, and in some special cases at one-fifth of the oil produced; and in the regulations of the Secretary of the Interior providing for the leasing of said oil and gas interests, it was determined that in addition to said one-sixth and one-fifth respectively, leases should be offered to the highest bidder on a cash basis.

In the sale of oil and gas leases, various amounts were received in cash, in addition to the amount specified in the contract to be paid to the Osage Tribe of Indians, and this cash has been designated by the Secretary of the Interior as "bonus," and a distinction is sought to be made by him between the status of this money called "bonus," and the status of the money received from the one-sixth and one-fifth royalty interest, as above stated.

The contention of the appellee is that said act of Congress, in providing for the royalty to be paid to the members of the tribe, intended to and did by such term cover *all income* received by the tribe from said mineral interests, and that no distinction can be made between the status of the money received as a premium in the sale of said leases, and the status of the money received from the royalty interest as specified in the lease contracts, so far as regards its distribution under the act of 1906.

This is the situation that now confronts this court in the determination of this controversy.

Long after the commencement of this action, to wit, on March 3, 1921 (41 Stats. 1249), Congress amended the act of 1906, and therein gave specific direction respecting payments thereafter made to the members of the Osage tribe, but this legislation can have no bearing on this action.

As we view this case, the three principal questions involved may be stated as follows:

First. Has the parent of a minor member of the Osage Tribe of Indians, under the act of Congress of June 28, 1906 (34 Stat. L., 544), the right to receive the moneys derived from the mineral interests of said tribe, and the interest money coming from the share

of such minor, and may such parent use the same in the education of his children, and in the support of the family in general, and in the furtherance of his own business interests; or must he account for the handling of such money the same as a legal guardian would have to account for the same?

Second. Is the so-called "bonus money," derived from the sale of oil and gas leases on Osage lands, a part of the "royalty" received from said oil and gas leases as comprehended by that term as used in said act of Congress of June 28, 1906?

Third. Can the Secretary of the Interior, by mandamus, be required to pay said moneys to the parent of said minors?

ARGUMENT.

First.

Has the parent of a minor member of the Osage Tribe of Indians, under the Act of Congress of June 28, 1906 (34 Stat. L., 544), the right to receive the moneys derived from the mineral interests of said tribe, and the interest money coming from the share of such minor, and may such parent use the same in the education of his children, and in support of the family in general, and in the furtherance of his own business interests; or must he account for the handling of such money the same as a legal guardian would have to account for the same?

In determining the question as to the right of these appellees to receive the moneys derived from their children's tribal interests, until said children arrive at their majority, it is necessary to give close considera-

tion to the provisions of said act of Congress of June 28, 1906.

Said act of Congress was entitled "An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes." The funds of the Osage Indians were divided, and each one's part placed in the Treasury of the United States, to be held in trust for him. The lands, with the exception of a few small tracts, were divided among the members of the tribe, giving to each his *pro rata* part, except "that the oil, gas, coal, or other minerals covered by the lands, for the selection and division of which provision is herein made, are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the 8th day of April, 1906." In section five of said act, it was provided that at the expiration of the period of twenty-five years from and after the first day of January, 1907, the lands, mineral interests and moneys held in trust by the United States should become the absolute property of the individual members of the Osage Tribe.

In addition to the trust fund and the interest to be received from the same, there were other funds which received the attention of Congress in said act, and that was the royalty received from minerals; the sale of town sites; claims which may be found to be due from other Indian tribes and from the United States; money to be received from three reservations, with one hundred and sixty acres each; and a specific provision was made as to the disposition of all of these funds.

Section four of said act, down to the third sub-division, reads as follows:

"Sec. 4. (Trust fund.) That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

"First. (Segregation of funds—pro rata division—interest payments—misuse of interest money of minors—payments to guardians.) That all the funds of the Osage Tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due said Osage Tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of said Osage Tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs, as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

"Second. (Deposit of funds to credit of Indians—distribution of.) That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

As will be observed by a careful reading of the above section, Congress was specific in stating what moneys should be held in trust by the United States for the members of the Osage Tribe of Indians and what moneys should be paid out. It provided that all the funds of the tribe, all the moneys then due, or that may thereafter be found to be due, all the moneys that may be received from the sale of Osage lands in Kansas, all the moneys found to be due the tribe on claims against the United States, after all proper expenses were paid, should be segregated as soon after January 1, 1907, as was practicable and placed to the credit of the individual members of the tribe on a basis of a *pro rata* division, the same to draw interest as then provided by law, which was five per cent. This con-

templated only such property claims and money as the tribe then had, and not profits or earnings to be received in the future. Congress provided that said interest as it accrued should be paid quarterly to the members entitled thereto, except in the case of minors, in which case it provided that said interest should be paid to the parents of said minors until said minor arrived at the age of twenty-one years. Congress, however, put a limitation upon the right of the parent to receive the interest on said minors' shares, by providing that if the Commissioner of Indian Affairs became satisfied that the interest of any minor was being misused or squandered by the parent he might withhold the payment of such interest. *Congress did not say how the parent should use said money, or put any limitations upon his right to use said money coming from the interest of a minor, except that the same should not be misused or squandered.*

At the time of the passage of said act the interest from the minors' shares was being paid to the parents under regulations of the Secretary of the Interior, without any qualification as to how the parent should spend it, except that he must not misuse or squander it. The interpretation placed upon this provision of the law by the Secretary of the Interior, and those under him whose duty it was to enforce the law, at the time of the passage of the law, was that the parent had the right to receive said money *as the head of the family* and use it as he saw fit, so long as he did not misuse or squander it, and this interpretation was the interpretation of all of the Secretaries of the Interior, and those under them, for more than eleven years after the passage of said act. If Congress had intended that the parent might be held to account to

the minor for said money it would undoubtedly have said so and made provision for the appointment of a guardian to protect the interest of said minor from being misused or squandered. No provision was made for the appointment of a guardian of the estate of a minor until the act of Congress of April 18, 1912 (37 Stat. 86), and then only for *orphan minors*. Evidently Congress, in providing as it did with reference to this matter, had in mind the long-established custom and policy with reference not only to dealing with the Osage Tribe of Indians, but with all other tribes of Indians by the Government, and that is that all moneys were to be paid to the heads of families, and the *pro rata* part which would otherwise be due to the minors in any Indian family, should be paid to the head of the family for the use and benefit of the whole family. If Congress had intended to change this well-established custom with reference to the Osages, undoubtedly it would have so provided. The act, however, by its plain and reasonable terms, does not mean anything else than that the interest of the minor should be paid to the parent, and the parent required to use it in a frugal, honest way, and not be permitted to use it for improvident and wrongful things, or to squander it in gambling, drinking, and such other things. Ample power was given to the Secretary of the Interior and the Commissioner of Indian Affairs, to make the parents of minors frugal, industrious and sober, and to train them to follow business occupations, and to make of themselves good and useful citizens, by keeping from them the interest on the minors' shares, unless they did use such interest in such way.

It is conceded by the appellant in this case, on pages six and seven of his brief, that appellees belong to

that class of people that do not squander their income. The only possible excuse, then, that can be offered by the appellant in this case for withholding from these appellees the interest of their minors, is that the same was being misused by these appellees, because they did not use each minor's share for the specific and sole benefit of such minor, and because it was used by the appellees in properly raising and educating their said children, and in proper business management, and because other members of the tribe squandered their income, overlooking the fact that the law provides ample means to prevent squandering of funds by parents by withholding payment from those who do squander it.

It is not denied that these appellees, by being frugal, careful, economical and using good business judgment, had accumulated a large fortune, and it is not claimed by the appellant that these appellees have either misused or squandered any part of the funds coming to them from the interest of their minors, except on the theory that all of said interest of each minor was not used for the specific and sole benefit of said minor.

The trial court, in passing on this phase of the case, very clearly stated the law as follows (Record, p. 21):

> "This act is a comprehensive piece of legislation, having for its object the division of the lands and funds of the Osage Indians in the then Territory of Oklahoma, and it is so entitled. In effecting its object striking evidence of its policy with respect to the interests of minors having living parents, is manifest. By section 2 of the act it is provided that selection of the lands belonging to such minors 'may be made by said parents,' and

by the provision of section 7, it is enacted 'that parents of minor members of the tribe *shall have the control and use* of said minors' lands, together with *the proceeds of the same*, until said minors arrive at their majority. (Italics by the court.) Section 4 provides that the interest to be paid by the United States on certain funds and moneys belonging to minors and held in trust for them by the Government 'shall be paid quarterly *to the parents* until said minors arrive at the age of twenty-one years.' And by the same section it is provided that royalty received from the sale of oil and other mineral leases upon the land selected and divided as stated above, and the moneys received from the sale of other specified lands shall be distributed to the individual members of the Osage Tribe 'in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States.'

"It seems clear from the foregoing résumé of the material portions of the statute under consideration that it was the intention of Congress to give to the *parents* of minor members of the tribe the *beneficial use* of so much of their children's property as is to be divided and distributed under the terms of the law, during the children's minority."

And again in the opinion, with reference to the proposition as to whether or not the appellant might limit the amount to be paid to the parent and might direct how the money should be expended by the parent, says (Record, p. 23):

"Coming now to the second question to be answered, it is to be observed that the contention of the respondent in this respect rests upon his interpretation of the first proviso of section 4 of the

statute. That proviso is in the following language: '*Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest.'

"The respondent's interpretation of this proviso takes the form of a limitation upon the use by the parents of a minor of the money of the latter paid to the former, both in respect of the amount and its application. He insists that such money can be used only for the benefit of the minor exclusively, and if not so used it would be deemed by the Commissioner of Indian Affairs as a misuse or a squander of said money, and further payments would be withheld except to the amount of $40.00 per month.

"In the opinion of the court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money as they are to have the use of the minors' lands and the proceeds of the same. A use, no doubt, that shall be wise and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens.

"To use these funds in hazardous or speculative undertakings, or in lavish and extravagant expenditures would be to misuse or squander them, and in that event the restraining hands of the Commissioner of Indian Affairs could and should be laid upon them. These are the possibilities that the limitation of the proviso is designed to guard against. It was not intended to clothe the Commissioner or the Respondent with authority to dictate the limit of the amount that the parents could expend *exclusively* upon their minor children from these moneys. The statute makes

the parents, not the Commissioner or the Respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant. But in order that the Commissioner may inform himself as to whether the limitation of the proviso *as its boundaries have been marked out herein,* are observed by the parents of the minors, it will not be an unreasonable exaction to require them to furnish him periodically with full statements of the expenditures by them of the moneys of their minor children received by them pursuant to the provisions of the statute that we have been considering."

It is this opinion of the Supreme Court of the District of Columbia that was upheld by the Court of Appeals of the District of Columbia. Record, p. 27.

It seems clear that if the parent has the right to receive this interest on the trust funds of the minors until the minor reaches his majority, and has the right to use it as he sees fit, so long as he does not misuse or squander it, then the Secretary of the Interior, as above set out by the trial court, could not control the *amount* that should be paid to the parent, *or put any limitations whatever upon it, except the one specified by the statute, to wit, the parent must not misuse or squander the same.*

Second.

Is the so-called "Bonus Money," derived from the sale of oil and gas leases in Osage lands, a part of the "Royalty" received from said oil and gas leases as comprehended by that term as used in said act of Congress of June 28, 1906?

We now come to the second proposition, that is, is the so-called bonus money included within the term royalty, as designated in said act, and does it come within the class of money that is to be paid out, or does it fall within that class of money that is to be held in trust by the United States? Referring to the second subdivision of said section four of the act of 1906, *supra*, it will be noted that Congress specifically provides that royalty received from the mineral leases, moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each, and all moneys received from grazing lands, shall be distributed to the individual members of the tribe, according to the roll "in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided." The "except as herein provided" of course refers to the right to withhold the share coming from the minors' interest from the parent, where the parent misuses or squanders it.

In the course of handling the affairs of the Osage Indians the Secretary of the Interior has adopted a new term for some of the income coming to the tribe, and designates it a "bonus." It is not disputed or denied that this bonus comes from the mineral leases;

to be more specific, from the oil and gas leases. It is a part of the income derived from the mineral reservation to the tribe. It might properly be said that in the first place for convenience it was termed bonus, which is a term that has recently grown up in the oil and gas fields and applied to oil and gas leases where money is received in addition to a stated royalty. But this so-called bonus must fall within one or the other of the two main divisions of the money belonging to the tribe as defined in the act of 1906—(*a*) that which is to be placed in the Treasury and held in trust for the tribe, and on which the tribe will receive interest, or (*b*) it must fall in that class *which is to be paid out.*

It would appear from a proper reading of the allotment act that there could be no question but that it fell within that class of moneys that is to be paid out, and this construction is strengthened by the fact that the Secretary of the Interior ever since the payment of the first bonus on leases sold in 1912, has paid and is still paying out this bonus money pro rata to the members of the tribe, except in the case of minors, which since June, 1917, he has either wihheld absolutely, or has paid to persons holding letters of special guardianship in behalf of said minors. If the appellant's contention is correct, that bonus is not part of the royalty, then he was violating the law by paying out this money to members of the tribe prior to March, 1921, instead of holding it in trust for them.

This in effect is the conclusion reached by the Comptroller of the Treasury in the following language:

> "I am constrained to decide that, within the purpose and meaning of the act, bonus money received from the sale of leases for oil, etc., *should*

be classed with royalties and which is required by the second exception to section 4 *to be placed in the Treasury* to the credit of the members of the Osage Tribe of Indians as other moneys of said tribes are to be deposited, *for distribution to the individual members of said Osage Tribe,* and therefore that said bonus moneys do not bear interest."

23 Decisions of Comptroller of the Treasury, pp. 483, 486.

It is plain from argument of counsel for appellant, and from the answer of the appellant to the petition in this case, that the basis and the reason for the position taken by the appellant, is the fact that in the last few years the income of the Osage Tribe of Indians from its oil interests has grown enormously, and the funds that were being paid out were so large that it looked to him like a great wrong to pay the minors' interest over to the parents without requiring them to account to the minor for it. *In other words, an attempt is made herein by the appellant to make expediency the law, in place of following the language of the statute.*

If it was correct in 1912 and in after years up until 1917, to pay over the bonus derived from the children's share to the parent, then the mere fact that in 1917 and since that time the amount has greatly increased, is no reason for assuming that the law was different from the position taken theretofore. However, the law did not leave the appellant without a proper remedy. It gave to him the right to withhold the interest of any minor when it was being misused or squandered, and if this law had been enforced in accordance with its terms, the complaint that is being made in this

case against the extravagance and waste and profligacy on the part of parents of the Osage Tribe of Indians would not exist, and such parents if they had been compelled to show that they were attempting to use this money judiciously and to the best interests of their family, and in trying to pursue some business methods or qualifications, and if they could not make such showing that the money would be withheld from them, we would see them now all prosperous and doing well. But the fact that there may be parents who are squandering and misusing the funds which come to them from their children's share, or their own funds, is no reason or justification for withholding this money from these appellees, who are admittedly frugal, industrious, economical, and prosperous. It would seem that it would be more in line with the plain intention of Congress and the correct interpretation of the law in question, if the appellees in this case were rewarded for their industry, economy and frugality, and permitted to go on advancing their interests and the interests of their family. It is evident that the children of these parents will not suffer by reason of their money being paid to them, as provided by law, because in the long run the children will receive the benefits of the financial success of these parents.

Congress intended, in line with the long-established policy of the Government, to give to the Indian, if possible, a superior advantage in transacting his daily business, and in competing with his more astute and sharp white brother, and that is one of the reasons why Congress provided that these moneys should be paid to the parents. Another reason is that Congress recognized the necessity for the education and care of these minors, so that they would grow up educated and

useful people, and therefore by this provision made it sure that the parents would be enabled to properly educate and rear their children, and put in the hands of the Commissioner of Indian Affairs the whip to make them properly educate their children by autorizing him to withhold from parents the children's money. Congress has the power to change this law, and the duty of the appellant is to follow the law, whether it suits him, or whether it does not suit him. He has no legislative capacity.

Complaint is made in the pleadings and in the argument that a large number of Osage parents are wasting and squandering this money. If that is true, then the plain duty of the appellant under the law is to withhold it. There is no requirement that he should pay it out to parents who misuse or squander it; the only requirement is as to those parents who do not misuse or squander it. The strained position taken by the appellant in this case, in order to limit the amount of money that should be designated as royalty under the terms of the act, is not justified merely on the ground of expediency, to keep from paying out money to those who are rightly entitled to it.

Third.

Can the Secretary of the Interior, by mandamus, be required to pay said moneys to the parent of said minors?

On the third proposition we are confronted with the statement that even if our position is correct as to the right of the parent to receive the money derived from the minors' interests, we can not by mandamus compel the Secretary to comply, and that therefore we are

not entitled to the relief asked. We do not concede that position of the appellant. On the contrary, the pleadings and stipulation in this case, together with the statement of counsel for the appellant, show beyond question that the position of the appellant now and ever since June, 1917, has been that he will not pay any money to these appellees coming from their children's shares, except on the guaranty that said money shall be used exclusively as the child's money, and for the use and benefit of each particular child. It is not claimed by the appellant that this money has been paid to these appellees except on the condition and absolute showing that it was received as the child's money, used as the child's money, and that no part of the same was used for the benefit of these appellees. This has specific reference to the interest on the trust fund of the minors, and to the moneys designated as royalty interests. So far as the so-called bonus money is concerned, it is not contended that any part of the same since 1917 has been paid to these appellees as parents, but it is the claim of the appellant that the same has been denied to these appellees, and that the appellant has not paid the same to these appellees *as parents,* for the reason that under the law he could not pay it to them *as parents,* but must either withhold it, or pay it out to someone holding authority as guardian to receive it.

It seems to us that under the law it is useless to plead facts further than have been pleaded setting up this state of affairs. The bonus money has been denied to the parents, and is so admitted. The so-called royalty and interest money has been denied to the parents, except upon the absolute showing and guaranty that it was received as the child's money, and would

be used in no other way. If the contention of the appellee is correct, or if it were a possible reasonable construction of the law, that the parent has not right to receive this income except as the representative of the child, and has no right to use it in any other way except for the exclusive benefit of the child, and cannot use it in general in the family, in educating the children and in his business, then we are not entitled to the writ prayed for. But if on the other hand, these appellees did have the right, and still have the right, so long as they do not misuse or squander the same, to receive said money and use it in a proper way, then we are entitled under the facts in this case, to the writ prayed for; and if our contention is correct, that the term "bonus" belongs to that class of moneys that must be paid out the same as the interest on the trust fund is paid out, then even from the standpoint of the appellant, we are entitled to the writ in this case, because no contention is made that they were denied the right to receive that money as parents, even at a time when the Commissioner of Indian Affairs was regularly finding that these parents were properly using and handling this money as the children's money. In determining this matter it must be borne in mind, as hereinbefore stated, it is not claimed that these appellees belong to that class of Indians that misuse or squander their money, or misuse or squander any moneys coming into their hands. That proposition is conceded by the appellant in this case, and the whole proposition resolves itself down to the question: May the appellant, by a misconstruction of the law deny the appellees their plain rights?

See Payne, Secy., *et al., vs.* U. S. *ex rel.* Newton, 255 U. S. 438.

The law of mandamus is that the courts will not seek to control the actions of an officer with reference to which he has a discretion, or with reference to judicial acts. It is different with reference to ministerial acts. In Merrill on Mandamus, page 30, section 30, this language is used:

> "A ministerial act is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."

Citing thereunder—

> Insurance Company *vs.* Wilder, 40 Kans., 561.
> Gray *vs.* State, 72 Ind., 567.
> United States *vs.* Whitney, 16 Dist. Col., 370.

And on page 279, section 225, the same author says:

> "A positive refusal is also not necessary in all cases before a writ of mandamus will lie to compel the performance of a duty. The law never demands a vain thing, and when the conduct of the officer is equivalent to a refusal to perform the duty desired, it is not necessary to go through the useless formality of demanding its performance. Anything showing that the defendant does not intend to perform the duty is sufficient to warrant the issue of a mandamus."

In this case, beginning with June, 1917, as shown by appellees' petition, notice was served on the appellees by the appellant that the moneys in question would not be paid to them as they had been previously paid, record, p. 4, and that they would in the future receive no funds belonging to their children as their own, ex-

cept the amount of $40.00 per month per child, afterwards changed to $50.00 per month, record, p. 5. They were also notified, as is shown by the pleadings and the admitted facts in this case, that no part of the so-called bonus money would ever be paid to them except as a guardian of the same for their children, and this notice from the appellant has been from that time until now specifically followed and carried out. Record, p. 12. We have therefore the specific refusal, the written notice to the appellees that they could not receive these moneys, actually carried out and enforced. What more could be done to lay the foundation for a writ of mandamus, if the action of the Secretary in refusing to pay was wrongful and was in derogation of the rights of the appellees?

Construction of Statutes.

In view of the importance of this case to these appellees, and the importance in which it is viewed by the appellants, we feel that we are justified in calling the court's attention to rules of construction of statutes, because this case resolves itself entirely upon what is the proper construction of the statute in question.

The attention of the court is again called to the admitted fact that at the time of the passage of the allotment bill and for a long time prior thereto, as well as for eleven years thereafter, the uniform policy followed by the Government, both before the enactment of said statute and afterwards, in carrying out the terms of said statute, was as is contended for by these appellees. Very much weight will be given to the conditions as they were at the time of the passage of the law, and very much weight will be given to the position taken by those whose duty it was to enforce the law at

the time of its passage, and who necessarily were in a position to know more about the objects and purposes of the same than those who would follow in office many years thereafter. We do not admit that there is any ambiguity in this statute, or that there is any special necessity for calling in anything in aid of a correct construction, but for fear that this controversy may raise in the mind of the court a question as to whether or not the statute was of a doubtful construction, we desire to call the court's attention to a discussion of the matter in 25 Ruling Case Law, section 252, page 1012, which reads as follows:

> "In construing a statute the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but, where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. When the words of a statute are not explicit, the intention of the legislature is to be collected from the context by considering the subject-matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be obtained and the remedy in view, by comparing one part with the other and giving effect to the whole by looking to the old law upon the subject, if any, and to other statutes upon the same or similar subjects, by considering the effects and consequences of a particular construction, and by looking to contemporaneous legislative history and contemporaneous construction of the statute."

If the court adopts the position taken by counsel for appellees, the statute is plain and clear, and is not in need of any aid, and we take it a citation on that well-established rule is not necessary.

In 36 Cyc., p. 111, section 4, paragraph A, this language is used:

> "In construing a statute the legislative intent is to be determined from the general view of the whole act with reference to the subject-matter to which it applies, and the particular topic under which the language in question is found."

Page 1106, 36 Cyc., section 2, paragraph A, we find this langauage:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority."

We do not offer anything further than these fundamental principles on the question of statutory construction. We assume that the court has had this proposition before it so often that the calling of the attention of the court to the fundamental principles is sufficient.

May the court appoint a guardian of the funds coming from the shares of minor members of the Osage tribe while said minors have living parents?

In the discussion by counsel for appellant of the status of the funds in question in this case, it is contended that Congress, by the act of April 18, 1912 (37 Stat. L., 86), provided for the appointment of a guardian of the estates of minors where the same were being wasted or misused. Reference to section 3 of said act shows that Congress provided:

> "That the property of deceased and of orphan minors, insane, or other incompetent allottees of the Osage tribe, * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma."

This is all there is to said act conferring jurisdiction upon the county courts and specifying those members of the tribes whose estates would fall within the jurisdiction of said courts. At the close of said section there is this proviso:

> "That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misued by such parents."

The question as to whether a guardian could be appointed for a minor whose parents are living was very carefully considered by the Supreme Court of Oklahoma in the case of Williams *vs.* Hewitt, 181 Pac., 286. In that case the court very distinctly held that no jurisdiction was conferred upon the county courts of Oklahoma to appoint a guardian for the estate of a minor whose parents are living. So that at this time there is no authority for the appointment of a guardian for the estates of minor Osage members of the tribe so long as the parents of such minors are living, but even if authority had been granted under the terms and provisions of said act as above set out, it would have no bearing upon the proposition involved in this controversy. The most that could be said with reference to said proviso is that it relates back to the act of Congress of June 28, 1906, and specially refers to the proviso in said act which authorized the withholding

of the funds coming from the shares of minors in cases where the parents were misusing or squandering them, and in such cases where the same were not paid out to the parents that a guardian of such funds might be named by the court. We cannot see that it has any bearing upon this case or is persuasive of the proposition urged by counsel for appellant, but because of the fact that counsel have submitted the argument they have, we make reference to it here.

Counsel for appellant also referred to parents of minor members of the tribe as "natural" guardians. There is no such thing under the laws of Oklahoma as a natural guardian of an estate. The only guardians of estates are those that are appointed under some specific law. *The funds that have heretofore been paid to parents of minor Osages have been paid to the parents as heads of the family, or as parents of the minor, and not in any capacity whatsoever as a guardian.* We therefore think that we are correct when we say that the question of guardianship from any viewpoint has no bearing whatever upon the merits of this controversy.

Conclusion.

In conclusion it should be said that the pleadings as well as the brief filed on appeal in this court evidences that the appellant concedes that the distribution as provided for in the Act of 1906 was sufficient to govern payments to the members of the Osage Tribe at that time because the amounts then paid to the several members was small, but his theory, in defense of his action complained of, rests upon the assumption that by the Act of 1906, the Secretary of the Interior was invested with power to change, modify, or amend the

distribution as provided for in that Act, when in his judgment the circumstances, that is, when payments to the several members increased, warrant the exercise of that power.

There is clearly no basis for this assumption of power. The Act of 1906 is plain and unambigous and its construction, as evidenced by its administration, coincident with the passage of the act, and for many years thereafter, if later believed to be unsatisfactory, on change in circumstances, the facts should have been brought to the attention of Congress and amendment sought in the proper way, as was done in the Act of March 3, 1921, hereinbefore referred to.

In this brief we have tried to confine ourselves strictly to the issues involved. We have not gone off after extraneous matters, or attempted to bring into the case a discussion of affairs and conditions which are not involved in, or appertain to, the controversy between these appellees and the appellant. Fine-spun theories and hypothetical cases which have no bearing have been left out. We have not gone off on any hunting or fishing expeditions, in the hopes that we would make a catch which would appeal to the court. We have tried to confine ourselves to the naked proposition involved, and that is that these appellees, being economical, frugal, industrious people—people who did not misuse or squander any funds coming into their hands—are entitled under the law to receive the funds coming from their minor children's shares, known and designated as interest on the trust fund, royalty, and bonus on mineral leases; that this right is a statutory right given to them, and which cannot be denied or taken away except upon a specific finding by the Commissioner of Indian Affairs that they are misusing or

squandering this fund. It is admitted that they do not misuse or squander moneys coming into their hands and that they are successful and prosperous people. They are denied the right to receive this money on what we believe to be a wrong construction of the law and a wrong enforcement of the same as against them. This is what we are seeking to have remedied. We believe that the lower courts were correct in the conclusions reached, and therefore respectfully ask that these decisions be affirmed.

Respectfully submitted,

F. W. CLEMENTS,
T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1922.

Hubert Work, Secretary of the Interior, *vs.* United States ex rel. Wm. T. Mosier, et al. } In Error to the Court of Appeals of the District of Columbia.

[March 19, 1923.]

This writ of error brings in review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of mandamus against the Secretary of the Interior commanding him to pay to the relators all the moneys due their minor children, members of the Tribe of Osage Indians of Oklahoma by reason of the distributions made under the Act of June 26, 1906 (34 Stat. 539), including their respective shares of bonus moneys paid the Secretary for oil leases made by the Tribal Council.

The relators are W. T. Mosier and Louisa Mosier, members of the Osage Tribe of Indians and enrolled as such under the Act of Congress of June 28, 1906 (34 Stat. 539), and are parents of John T. Mosier, Edwin P. Mosier, Luther C. Mosier and Agnes C. Mosier, also enrolled members of the same tribe, who are minors and in the care and keeping of the relators.

In their petition, after reference to the provisions of the law of 1906 and their history, they allege that the Secretary of the Interior has refused to pay them certain income due them under the statute as parents of these minors, and has imposed on payment thereof conditions and limitations unauthorized by the act and beyond his power to impose. The Secretary answered admitting his refusal, and asserting that under the statute he and the Commissioner of Indian Affairs were vested with a discretion to protect the interest of the minors, and that his refusal was in the exercise of that discretion. The facts are shown in the admissions in the pleadings and by a stipulation. They can be better understood after a statement of the act whose construction is the subject matter of the controversy.

The Act of 1906, *supra,* entitled, "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes", provided for the enrollment of the tribe including minors, and for the division of the land between them by selection, the selection for the minors being made by their parents, but forbade the sale of the oil, gas, coal or other minerals covered by the lands, the minerals being reserved to the use of the tribe for a period of twenty-five years, the royalties to be paid to the tribe. The act directed that the gas, oil, coal and other minerals should become the property of the individual owner of the land at the end of that period unless otherwise provided. Section three of the act directs the leasing of oil, gas and other mineral rights in these lands by the Tribal Council under such rules and regulations as the Secretary may direct and with his approval, provided "that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States." The effect of the act was to give to each member of the tribe three selections of land, part of which was to be a homestead and the remainder surplus land, all to be farmed by him for twenty-five years and to become his absolute property at the end of that time. Under section 4, funds belonging to the tribe and derived from various sources were to be held by the United States as trustee for twenty-five years, and the interest as earned thereon was to be divided between the members of the tribe. In addition, under the second paragraph of section 4, the royalty received from oil, gas, coal and other mineral leases and all moneys secured from the sale of town lots and other lands of the tribe, and from rent of grazing lands, were to be distributed to the members of the tribe as income, payable quarterly. Thus the members of the tribe were to share in two kinds of property, first, homesteads and farm lands and their proceeds, and, second, income from the sources above mentioned. So far as minors were concerned, the methods of distribution of the income from the two kinds were described in somewhat different language. The directions as to proceeds from lands is in section 7 as follows:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided: and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically

provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

The first paragraph of section 4 prescribes the method of distributing the income from the second kind of property and directs that it shall be paid quarterly to the members entitled except in case of minors, in which case it shall be paid quarterly—

"to the parents until said minor arrives at twenty one years; *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest; *And provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

For ten years, after the act, the sums due the minors were small and were evidently not more than enough to furnish reasonable support of the minors by the parents; but thereafter by the increase in the value of the oil and gas properties, the income payable grew to such amounts that Secretary of Interior Lane, who was the first defendant herein, deemed it his duty to take action to prevent a sacrifice of the minors' income and through the Commissioner of Indian Affairs called for accounts from the parents of the manner of the disposition of minors' income paid them. He issued an order that the income should be devoted solely to the care and use of the minor whose income it was, that any other use would be misuse, and that no more than fifty dollars a month would be paid to the parents on account of a minor's share, unless a specific showing was made that the funds were being used for the specific benefit of each particular child. As already shown, the royalties on mineral leases were fixed by the President. As the mineral properties became more valuable and after a general lease known as the Foster Lease was ended, the practice was initiated with approval of the Secretary of putting up the privilege of leasing particular mineral properties at auction. Large sums as down payments in addition to the royalties as fixed by the President were realized, inuring to the benefit of the tribe. The Secretary held that these sums, called "bonuses" were not royalties but

should be deposited in the Treasury as part of the trust funds for the tribe held by the United States and that only the interest therefrom should be distributed. The Comptroller of the Treasury ruled against this view at least so far as to hold that there was no authority of law for such an interest bearing deposit in the United States Treasury. 23 Comptroller's Decisions, 483, 486. Nevertheless, the Secretary withheld payment of minors' interest therein from the parents. While it was admitted that many of the Osages are idle, wasteful, extravagant and improvident, it was also admitted that the relators were not so. The stipulation of facts showed that at no time prior to the rendition of accounts by the relators under the order of April 26, 1917, had the Indian Commissioner ever determined that the relators had misused or squandered the funds, that relators' accounts theretofore showed that the funds paid them were providently expended for the direct use and benefit of the minors or were invested and retained for their ultimate use and benefit, but that since April 26, 1917, the relators had neglected and refused to render any accounting and the Commissioner had been without information on which to determine whether the funds were being misused or squandered.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The questions presented are, first, the proper classification of bonuses under the statute, second, the validity of the conditions imposed by the Secretary on the payment of the minors' incomes to the parents, and third, the propriety of mandamus as a remedy in this case.

The bonus which was the result of bidding for desirable and profitable oil and gas leases secured for the members of the Osage Tribe the just value of the use of their property which the fixing of royalties in advance by the President was not adapted to give them. It was in effect a supplement to the royalties already determined. It was really part of the royalty or rental in a lump sum or down payment. We do not see how it can be classified as anything else. It was income from the use of the mineral resources of the land. Of course, it involved a consumption and reduction of the mineral value of the land, but so does a royalty. This is an inevitable characteristic of income from the product of the mine.

What was intended to be distributed to the members of the tribe was the income from the mineral deposits in their lands, and the bonus was part of that. Doubtless Congress had in mind regular annual or quarterly equal payments when it used the word royalties; and did not anticipate such large down payments. But in the unexpected event, we must decide under what head the bonus is to be treated, whether as capital or income, and it seems clear to us that, in view of the entire statute, it is more aptly described by the latter term.

Nor is the settlement of this question a matter of discretionary construction by the Secretary. The Act of June 26, 1906 (34 Stat. 539), was enacted to make a definite disposition of the Osage Indians' resources. Except those which were sold outright or were kept as tribal lands for grazing, all lands were divided between the members of the tribe adults and minors, share and share alike, for individual use for every purpose except the production of minerals, and at the end of twenty-five years the parcels were to vest absolutely in the respective individuals or their heirs. On the other hand, the funds of the tribe were to be kept by the United States in its treasury and interest thereon was to be paid quarterly to the members, share and share alike. In addition to this interest, there was also to be distributed as they fell due, the royalties from leases of mineral rights, the proceeds of the sale of certain lands already referred to and the rentals from the grazing lands. The question whether bonuses were to be included in royalties is a matter of statutory construction, not finally entrusted to the discretion of the Secretary, but determinable in court at the instance of the beneficiaries as of right.

Having thus determined that the duty of the Secretary to pay this income to the adult members of the tribe is ministerial, we come now to the question how much discretion the statute gives him in withholding payment from minors. In respect to the income from the distributed lands, the Secretary has no duty whatever. The lands of the minors are given over to the custody and use of the parents who can cultivate or lease them and apply the proceeds as they see fit. Congress evidently intended to trust to the natural disposition of the parents to look after and care for their children out of the proceeds, and to allow them to treat the proceeds of the inalienable lands as a family fund to be administered by them until the children should reach their majority. It was prob-

ably anticipated that the proceeds of a minor's land from agriculture only would not be large and could not greatly exceed, if indeed it would equal, the expense his care and support would entail on the family.

With respect to the payment of income from United States bonds, mineral leases, sale of extra lands and grazing rents, belonging to minors, Congress seems to have had a similar view; but it did vest in the Commissioner of Indian Affairs, subject to the supervision of the Secretary of the Interior, discretion to see that its confidence in the natural parental feeling as a motive for care of the minors' interest in such income should not be abused, and whenever he found misuse or squandering by the parents of the income, he was given authority to withhold payment.

The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds would be permitted which did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the Act of 1906 by the Act of March 3, 1921 (41 Stat. 1249).

The direction to the Secretary to pay to the parents the income due to the minors is clear and positive. It is that the income "shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years." The proviso "That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being used or squandered he may withhold the payment" did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which what was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited monthly rate was being used for the specific benefit of each child. Congress evidently intended that the Commissioner should through his agents keep track of the conduct of parents in the use of the

income of their children and necessarily vested him and the Secretary with power to require an account of how the income was being used; but this was not a regulatory function to be exercised in advance of payment which is positively enjoined. The proviso imposes on the Commissioner the duty of supervising each case and determining from the circumstances whether there has been, in cases of payments made, misuse or squandering, and if so, of withholding further payment on account of it. No bond is required of the parents as would be in case of a guardian to whom the income is to be paid in the absence of parents; and it was the evident purpose of Congress, in view of the then comparatively small amount of the probable income, to allow it when there was a family to go into the family funds for the support of the family and of the minors as part of the family. This was the intent in respect to the annual proceeds from the land allotted to the minors, and the same purpose may be inferred as to the income from the funds and royalties, qualified, of course, by the proviso in order to prevent a perversion or squandering of it which would defeat this purpose.

We come, then, in our view of the statute, to consider the correctness of the judgment of mandamus of the District Supreme Court as affirmed by the District Court of Appeals. The opinion of the Supreme Court which was adopted by the Court of Appeals closes as follows:

"The conclusion is that the second question must be answered to the effect that the respondent can not limit the amount to be paid to the relators as the parents of their minor children from the moneys distributable to them under the law, but can require from them the submission of periodical statements of accounts showing in detail the expenditure of the moneys so received. With this limitation on the scope of the writ of mandamus prayed for, it will issue as prayed.

"And it is so ordered."

But the judgment actually entered and affirmed is as follows:

"Ordered and adjudged that the prayers of the petition be and the same are hereby granted and the writ of mandamus be issued herein directed to the respondent, commanding him to deliver, or cause to be delivered to the plaintiffs all the moneys due their minor children, members of the Tribe of Osage Indians of Oklahoma, by reason of the distributions made in virtue of the act of June 26, 1906 (34 Stats. 539), prior to the filing of the bill in this cause including their respective shares of bonus moneys distributable as royalties under said Act."

This is broad and unconditional and can not be sustained. The relators had refused and neglected to give an accounting of the funds last paid to them for the minors and the Commissioner and Secretary were entitled to withhold future payments until the Commissioner was by such accounting enabled to determine whether in his judgment there was a misuse or squandering of the income then being expended. The fact that, in the past the relators had satisfactorily accounted for money received is not sufficient. The Commissioner was entitled to the latest information before acting. The principles governing the issuing of the writ of mandamus in such cases have been much considered by us. *Hall* v. *Payne*, 254 U. S. 343; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549; *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316. Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether in his judgment there has been misuse or squandering, and, within the same limitation, to decide what is misuse or squandering. Until he has had a full opportunity to exercise this discretion, neither he nor the Secretary can be compelled by mandamus to make the payment, and if in its exercise, he does not act capriciously, arbitrarily or beyond the scope of his authority, the writ will not issue at all.

Our conclusion is that the petition for the mandamus in this case should be dismissed without prejudice to the filing of another petition after the relators shall have made the requisite accounting of the moneys of the minors paid them down to the date of filing, and shall have submitted the same to the Commissioner, and after the failure, if there be such, of the Commissioner and the Secretary within a reasonable time to exercise the discretion vested in them under the statute as we have construed and limited it in the foregoing opinion. The case is, therefore, reversed and remanded to the Supreme Court of the District with instruction to dismiss the petition accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.